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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1938

No. 312

JOHN M. TAYLOR, *ET AL.*, *Petitioners*,

vs.

STANDARD GAS AND ELECTRIC COMPANY, *ET AL.*,

Respondents.

BRIEF FOR H. N. GREIS, TRUSTEE—ONE RESPONDENT.

[Opinion of court below, 96 F. (2d) 693.]

May It Please the Court:

The Trustee appears in this Court solely for the purpose of urging the approval of the compromise of Standard's claim or its adjudication and disallowance *in toto*, albeit with misgiving as to the effect of applying the "instrumentality" doctrine, as pointed out under Paragraph F, beginning on page 13 herein.

What division should be made of the stock of the New Company between the preferred stockholders of Deep Rock and the Standard was a question for the trial court to decide in the light of *(1)* the issues raised by the Trustee in his objections to Standard's claim, and *(2)* the Standard's offer to reduce its claim for $9,342,642.37 as a creditor of the same rank as other creditors to *(a)* $5,000,000.00 as a creditor, *(b)* subordinate to claims of all other creditors,

and *(c)* take common stock of the New Company there
Question: As between the preferred stock of $5,000,00
and Standard's subordinated claim as a creditor for $5,0
000.00, how shall the stock of the New Company be a
cated?

Standard's Claim Not Adjudicated.

This is not an appeal from a judgment of either t
trial court or the Court of Appeals adjudicating the Stan
ard's claim in whole or in part. The validity of the Stan
ard's claim is drawn in question by petitioners as a me
incident to their appeal from the judgment of the trial cou
approving the compromise as a part of the Amended Pla
That narrows the issue down to this question: *Is the Stan
ard's claim so utterly false, fraudulent, or unfounded th
it could not form the basis of a compromise?* The Trustee
counsel refused to discuss compromise of the Standard
claim until all the evidence had been submitted to the Ma
ter in Chancery. (See Paragraph 24, page 9 of Exhib
"A" hereto, and Shinners' testimony quoted on page 14 o
Exhibit "A" hereto, wherein Shinners testified that th
Trustee's counsel "told him they would not discuss compro
mise or negotiations until all the evidence was closed," etc.

Instrumentality Rule.

There is no hard and fast rule for determining whe
one corporation is or is not the instrumentality or mere
agency of another corporation. It seems that the law in
this country on all subjects is now and has been for four
or more years drifting towards utter uncertainty, if not
chaos. Neither the Trustee nor his counsel, nor the District
Court, nor the Court of Appeals could with any reasonable
certainty of correctness determine whether or not the Deep
Rock was a mere instrumentality of the Standard.

Mr. Douglas, at present Chairman of the Securities and Exchange Commission, and Mr. Shanks, of the New York City Bar, in an article on this subject appearing in 39 Yale Law Journal, page 193, conclude their article, on page 217, as follows:

> "From the foregoing it will be seen that where CONTRACTUAL rights are concerned *the contents of any rules which may be stated to help in the work of prediction are but shifting and faintly outlined at the best, themselves uncertain subjects of predictability.*
>
> "As yet the subject is covered with a 'mist of metaphors.' Until the courts stop to analyze with more particularity the factors motivating their decisions before lapsing into phrases such as 'alter ego' or 'adjunct' or 'instrumentality' there seems little hope of making prediction more certain than the foregoing."

It is easy to determine in some cases from the facts that one corporation is a mere instrumentality of another where, for instance, the dominant corporation owns all the stock, or substantially all the voting stock of the subsidiary and caused the subsidiary to be organized for the purpose of carrying on some of the dominant corporation's business as a mere agency. Illustrating this is a long list of adjudicated cases cited on pages 207 to 209 in Exhibit "B" to this brief.

The late Mr. Justice CARDOZO, while a member of the Court of Appeals of the State of New York, in *Berkey* v. *Third Ave. Ry. Co.*, 244 N. Y. 84, 155 N. E. 58, speaking for the majority of the Court, in declining to apply the instrumentality rule, wisely said:

> "The whole problem of the relation between parent and subsidiary corporations is one that is still *enveloped in the mists of metaphor.* Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, *they end often by enslaving it.* We say at times that the corporate entity will be ignored when

the parent corporation operates a business throug subsidiary which is characterized as an 'alias' o 'dummy.' All this is well enough if the *picturesque of the epithets* does not lead us to forget that the ess tial term to be defined is the act of operation."

Plaintiff in that case sued the dominant corporation damages suffered from an injury occasioned by the alleg negligence of the subsidiary street railway company. It significant that Mr. Justice CARDOZO said, "It (the subsi iary) was not organized by the defendant as a decoy or blind. It was not organized, so far as the record shows, the defendant at all." He also said that while it was tr the subsidiary "lost money that year," so also "did i parent," but he said "The fact remains that it was fun tioning as a corporation continuously and actively." Th facts and circumstances upon which plaintiff relied to hol the parent company liable were stated by Mr. Justice CA DOZO as follows:

"The question is whether other circumstances ye to be noted neutralize these indicia of separate life and operation. The *defendant*, as we have seen, was the owner, in *1916*, of substantially all the stock of the sub sidary corporation. Its president in reporting to the stockholders the financial situation at the end of the fiscal year informed them that to make the picture ac curate, the statement must exhibit the consolidated in come, and this was obviously true. Other ties must be shown in addition to the one resulting from ownership of shares. *The members of the two boards of directors were nearly, though not quite, the same. Each road had the same executive officers, i. e., the same president, treasurer, general manager, paymaster and counsel.* The parent has made *loans* to the subsidiary from time to time, sometimes for construction, sometimes for op erating expenses. The loan for construction expenses ($6,415,152.92) is represented by a demand note. There is nothing to show whether the money was borrowed for

the original construction in 1884 or for later changes of construction when the road was electrified. The parent is also the holder of the second mortgage bonds, $1,487,000, the first mortgage bonds, however ($1,200,000), being issued to the public. The operating loans are temporary advances for electric power, for materials or supplies, *and for the salaries of executive officers. As a matter of conveniene, these are made in the first instance out of the treasury of the parent company.* They are then charged to the account of the subsidiary, and repaid generally the following month and not later than the following year. *Repayment is inconsistent with an understanding that the parent, in making the advances, was operating on its own account the cars of a connecting line.* The charges are more than book entries, mere devices of an accountant. Drafts are drawn upon the subsidiary and paid with its own money. The unpaid advances for operation in July, 1917, were only $253,029.37, and this at the end of a poor year. We are not to confuse the salaries of the executive officers with the wages of motormen and conductors. The latter, as already pointed out, were paid in the first instance, as well as ultimately, by the subsidiary itself."

Mr. Justice CARDOZO also said:

"*Community of interest there must obviously* be between a subsidiary corporation and a parent corporation, the owner of its stock. This community of interest would prompt the parent, not unnaturally, *to make advances for operating expenses to the subsidiary when convenience would be thus promoted.* The advances so made have for the most part been repaid, and in so far as they remain unpaid have been carried as a debt."

Two of the judges on the Court of Appeals dissented on the ground that the subsidiary was a mere agency and instrumentality of the parent company.

Some time before the hearing in the District Court of Standard's Second Offer of Compromise during which coun-

sel for the Trustee stated that they were making "no rec mendations here on behalf of the Trustee to either accept reject the compromise" (R. Vol. 2, p. 524), the trial cou as shown on page 34 of Exhibit "A" hereto, appoint Mr. Gibson attorney for the Standard, Mr. Milsten, att ney for the Independent Committee, and myself, attorn for the Trustee, to make recommendation as to whether not the Standard's claim as a part of the reorganizati should be compromised. It is reasonable to suppose th the trial court anticipated the Standard's counsel reco mending the approval and the Independent Committee counsel recommending its disapproval, and that the Tru tee's counsel's recommendation would be given some co sideration. I recommended the approval of the compromi as a part of the Amended Plan of Reorganization.

Reasons of Trustee's Counsel for Recommending to the District Court the Acceptance of Standard's Second Offer of Compromise as a Part of the Amended Plan.

(A) I did not regard the original Plan of Reorganiza tion as fair to either the creditors or preferred stockhold ers. It provided for the issuance of preferred stock by the New Company and did not give proper protection to the note holders, and I was morally certain the Court would not approve the first plan. It was my opinion and that of my associates that neither the Trustee nor his counsel had any business meddling with the Plan unless called upon by the Court for our views. The Amended Plan as modified pro- vides only for common stock and gives the noteholders and creditors ample protection.

(B) I favored the acceptance of the Standard's Second Offer of Compromise as an *inseparable* part of the Plan largely because it placed the Trustee in a most favorable strategic position (unless knocked down by conditions dis- cussed in Paragraph F herein) in this:

(1) If no appeal, the litigation was ended and a reorganization could be consummated in short order.

(2) If appealed the Appellate Court would have before it incidentally the Standard's claim as well as the Amended Plan. No Reorganization Plan could be considered or approved without a prior disposition of the Standard's claim by compromise, or final adjudication.

(3) If the Appellate Court affirms the judgment of the trial court in approving the compromise and the Plan, then the note holders and other creditors to whom the Trustee owes the *first and primary duty* are fully protected against the Standard as a creditor. *The compromise eliminates the Standard as a creditor and gives the note holders and other creditors first call on* the assets of the Deep Rock. If this court goes into the merits of Standard's claims and rejects the compromise and reverses the lower court on the ground that the Standard has no valid claim under the instrumentality rule or for want of proof, then the Trustee's objections to the Standard's claim are sustained and the Trustee upheld in his assault upon the Standard's claim. In other words, *so far as the creditors are concerned, the Trustee is in a position where he can not lose.* Suppose the Trustee litigated the Standard's claim to a final judgment allowing the Standard three or four million dollars on a parity with other creditors, the Company would be immediately faced with liquidation, and knowing these oil companies, their ups and downs, and the speculative nature of their business, the Trustee's counsel are and have been of the opinion that the note holders' securities would be seriously jeopardized. At the time the District Court approved the compromise and the Amended Plan on February 3, 1937, there was almost three million dollars of accrued interest on the $10,000,000.00 notes. Assuming Standard could establish $3,000,000.00 on a parity with creditors, that would make $16,000,000.00 and

in our judgment on that basis Deep Rock's preferred stock would not be worth ten cents on the dollar. *It was and is our opinion that it is wise to eliminate the hazard overhanging the creditors by settling the Standard's claim by the issuance of common stock and thus removing it from the status of a claimant and substituting the position of a stockholder.*

(C) *Petitioners' counsel admit in their brief in the Court of Appeals, page 267, and in a foot-note on page 70-A of their brief in this court that if the assets of the Refining Company belong to the Deep Rock, outright or through the ownership of the 9,000 shares of the Refining Company stock, then "it would be necessary to reverse the credits that appear in the Standard's account (Item 31) in the amount of $649,999.00 (I. 62) and (Item 55) in the amount of $1,894,592.11 (I. 63)." That totals $2,544,591.11.*

The Trustee, in his amended objections to the Standard's claim (R. Vol. 1, pp. 108-121) avers that both of the Refining Company leases, the one of October 1, 1925, and the one of December 20, 1930, should be adjudged unconscionable, fraudulent, and as such, null and void, which is in effect an action in equity to cancel the leases as fraudulent. Although the leases were fraudulent and forced on the Deep Rock by the majority controlling stockholder, nevertheless the Standard would be entitled to recover $2,544,591.11, cost of the Bradstreet properties and cracking plant, without regard to the instrumentality rule. *Standard did not intend to make a gift of this large sum to Deep Rock and thus enlarge the value of the Deep Rock's preferred stock.*

As said by this court in *Southern Pacific Company v. Bogert*, 250 U. S. 483, 63 L. ed. 1099, "The minority stockholders who seek equity should do equity; and a court of chancery has power in granting relief to prevent unjust *enrichment* of the *minority* stockholders at the expense of the *majority* stockholder."

Suppose we wipe out the Standard's claim in its entirety; nevertheless, upon cancelling the leases Standard is entitled to a judgment for $2,544,591.11 with interest at the Illinois rate of five per cent per annum from October 1, 1925. The interest on that sum at five per cent per annum up to February 3, 1937, is $1,442,532.15, making a total of $3,987,123.26. Two more years' interest, up to February 3, 1939, will run the total up to $4,241,582.38. If that amount is allowed the Standard on a parity with other creditors, it would seriously jeopardize the rights of the $10,000,000.00 note holders and render almost valueless, the *Deep Rock's preferred stock.*

Even if the allowance of that large sum to Standard is subordinated by Court decree to claims of creditors, nevertheless it would require something more than the "Instrumentality Rule" to subordinate it to claims of preferred stockholders. How could the trial court, or the trustee or creditors foretell what the court of last resort will do about that question as we find no precedents to guide us? Subordinating Standard's claim to rights of other creditors is quite a different thing from subordinating it to equities of preferred and common stockholders.

On page 70-A of Petitioners' brief will be found a summary of what they claim are *unsustainable* charges by Standard against the Deep Rock from 1919 down to April 1, 1933, in the aggregate sum of $19,898,808.73. Although that figure is utterly unreasonable, let us accept it for the moment. Petitioners fail to reverse the credit given Deep Rock by Standard in April, 1928, as of February 24, 1928, of $11,122,400.00 credited Deep Rock by Standard in the purchase of unmarketable common stock. If we are going back of that April 1928 settlement; *we ought to go back* in earnest, and sue Standard for the value, if any, of the common stock it received in 1928 or rescind that deal. Petitioners

can not charge Standard with illegal rentals and management fees, etc., *it charged off in 1928*. Reversing that credit of April, 1928, means the addition of $11,122,400.00 to the $9,342,642.37, the balance Standard now claims. That gives a total Standard claim of $20,465,042.37. Subtracting from that sum the $19,898,808.73 leaves a balance in Standard's favor of $566,233.64. Allowing Standard *no interest* whatever on that balance, but adding the principal to the above sum of $3,987,123.26, representing the rescission of the Refining Company leases, we have in favor of the Standard a total sum of $4,553,356.90. Adding that sum of $4,553,356.90 to the principal of the $10,000,000.00 notes and the almost $3,600,000.00 accrued interest thereon ($18,153,356.90), the Trustee would find himself with an indebtedness rendering the Deep Rock's *preferred stock worthless*.

(D) On the instrumentality rule, this is the question: Has the Standard, the majority stockholder (owning 95 to 98 per cent of the voting stock) so managed and operated Deep Rock as to obliterate the separate corporate entity between the Deep Rock's properties and the Standard's properties and require the Court to hold that moneys and credits advanced to Deep Rock by Standard were no more nor less than Standard loaning or advancing money to itself? On this question the following facts will be given consideration, to-wit:

(1) The assets of the Deep Rock and the Standard have never been commingled.

(2) The Deep Rock was not organized by Standard and has maintained the form of separate corporate entity, kept its own books and records.

(NOTE: Under the title, "Debtor's Business and Capital Structure," on page 3 of Petitioners' brief, it is stated that "Deep Rock was organized in 1919 by Standard and its affiliated interests through the pur-

chase of a going oil business." The Deep Rock was not organized by the Standard or its affiliated corporations. The history of the organization of the Deep Rock, under the name of Shaffer Oil and Refining Company, is stated on pages 9 to 18 of Exhibit "B" hereto attached, from which it appears that C. B. Shaffer was a large stockholder and first President of the Deep Rock and served as such for almost two years under a written agreement that he should become a director and member of the Executive Committee and President of the Company, and that the number of directors of the company should be ten, "of which C. B. Shaffer shall nominate five, H. M. Byllesby is to be elected a director and chairman of the Board of Directors of the Company to be formed." A voting trust was formed under which each of the parties, that is, Shaffer and Byllesby and Company, did name two trustees to vote the stock.)

(3) The Standard is not an oil company, and never owned or operated any oil properties.

(4) The Standard and the Deep Rock are not engaged in the same kind of business and never have been.

(5) The Deep Rock is not a wholly owned subsidiary of the Standard. There are 50,000 shares of Deep Rock preferred stock, redeemable at $100.00 per share, all of which is outstanding in the hands of the public with the exception of 969 shares owned by Standard.

(E) It is the contention of Petitioners' counsel and the Trustee (see Exhibit "B" hereto) that the Standard so dominated and operated the Deep Rock as to convert the Deep Rock into a mere department of the Standard, for all practical purposes analogous to a department store, the Standard having its offices on the top floor, its clothing department on the second, its shoe department on the third, its grocery department on the fourth, and so on. But, suppose the instrumentality rule is applied in this case—in what position does that put the *Deep Rock's preferred*

stockholders?—and on that question we can find no judicial decision except the *dictum* in *In re Davison Chemical Company.* (Maryland Fed. Dist. Ct.) C. C. H. Bankruptcy Service, No. 3656, to the effect that the claim of a parent corporation will not be subordinated to the interest of the preferred stockholders of a subsidiary by a reorganization of the latter under Section 77-B of the Bankruptcy Act. But in that case it appears that the subsidiary corporation's creditors were not awarded priority over the parent company.

Suppose the Standard, on an adjudication of its claim, is allowed anywhere from three to six million dollars, subordinated to the claims of the $10,000,000.00 note holders and other creditors, will the Standard's allowed claim in the amount be subordinate to the Deep Rock's preferred stockholders? *That calls for plowing in new ground.* Should the Trustee hazard the security of the note holders and other creditors in contesting to the bitter end the Standard's claim as a *creditor? The compromise eliminates Standard as a creditor,* so the only one to profit by the uncertain outcome of the litigation would be the preferred stockholders *in the event* the Court should adjudge Standard had no claim whatever, or a valid claim for a very small amount. The simple fact that the Standard was a majority stockholder and dominated the Deep Rock did not disqualify the Standard from becoming a *bona fide* creditor of the Deep Rock. Even directors, as well as majority stockholders, can make *bona fide* loans to their own corporations.

—*Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587-594, 23 L. ed. 328;

Heim v. *Jobes,* (10th Cir. Apps.) 14 F. (2d) 29-32;

Forbush Co. v. *Bartley,* (10th Cir. Apps.) 78 F. (2d) 805;

Vennerbeck & Clase Co. v. *Juergens Jewelry Co.,* (R. I.) 164 Atl. 509.

As the creditors undoubtedly have priority over the preferred stockholders, it seems that the trial court exercised a *sound discretion* in eliminating the Standard as a claimant and relegating it to stock ownership, thereby avoiding imperiling the rights of the creditors.

(F) If, as contended, the Standard so conducted and operated the Deep Rock as to convert the Deep Rock into a mere instrumentality or department of the Standard, and all money Standard advanced to Deep Rock or paid out for Deep Rock's credit was a capital investment which Standard could not withdraw because in effect it was taking money out of its right-hand pocket and putting it over in its left-hand pocket, we run into another snag the Trustee should not have to fish out. If the preferred stockholders are given priority over any part of the claim allowed to the Standard, say three or five or six million dollars, then it would appear that the preferred stockholders are being enriched at the expense of the Standard, although it nowhere appears that Standard had any intention to donate money to Deep Rock for the benefit of its preferred stockholders.

If the Deep Rock is a mere department of the Standard, then what about the rights of the Standard's stockholders and creditors?

In the last analysis it was Standard's stockholders' money. There are several thousand Standard stockholders and millions of dollars of Standard's indebtedness. If the separate corporate entity is broken down for one purpose, it is down for all purposes, so far as creditors are concerned.

The United States Court in Delaware under 77-B has jurisdiction over the Standard's properties wherever located, and draws to itself power to administer the assets of

Standard in Oklahoma, Texas, Kansas, and every
state.

—*In re Greyling Realty Corporation*, (2nd
Apps.) 74 F. (2d) 734.

Deep Rock's Assets Liable for Standard's Debts?

It has been repeatedly held that the Court having
risdiction of the parent company bankruptcy will take
and administer for the benefit of its creditors the prop
of a subsidiary corporation *upon proof* that the subsid
is a mere department of the bankrupt corporation. If
Deep Rock is a mere department of the Standard, then
United States Court in Delaware has jurisdiction in St
ard's bankruptcy proceedings to take over and admini
all the property of the Deep Rock, wherever located.

*Ramsey testified (R. Vol. 2, p. 392) that "Standa
balance sheets show a funded debt of $73,649,500.00.
total liability of Standard and its subsidiary and affilia
companies as shown by the consolidated statements agg
gates $1,196,937,780.52." The following is a copy of a p
in Standard's petition filed in the Delaware Federal Co
under Bankruptcy Section 77-B:*

STANDARD GAS AND ELECTRIC COMPANY
BALANCE SHEET, JUNE 30, 1935.

LIABILITIES, CAPITAL AND SURPLUS.

Current Liabilities (exclusive of long-term debt maturing October 1, 1935):		
Accrued liabilities, including provision for estimated additional Federal income taxes for prior years and interest thereon—see Foot-Note G.....	$	2,163,851.
Long-Term Debt—see Foot-Note C:		
Twenty-year six per cent gold notes, due October 1, 1935.....	$	14,823,000.00

Six per cent convertible gold notes, due October 1, 1935.....	9,826,500.00	
Six per cent gold debentures, series A, due February 1, 1951.....	15,000,000.00	
Six per cent gold debentures, series B, due December 1, 1966.....	10,000,000.00	
Standard Power and Light Corporation, six per cent gold debentures, due February 1, 1957 (assumed).....	24,000,000.00	
Total long-term debt.....		$ 73,649,500.00
Insurance Reserve—see Foot-Note D.....		2,099,953.28
Capital Stock—see Foot-Note E:		
Preferred.....$	87,350,943.35	
(Prior preference, without par value—		
Authorized, 750,000 shares:		
$7.00 cumulative - issued, 378,000 shares, less 9,652 shares reacquired and in treasury, outstanding 368,348 shares, maximum amount payable in liquidation, $100.00 per share and dividends accumulated and in arrears thereon.		
$6.00 cumulative - issued and outstanding, 100,000 shares;		

maximum amount payable in liquidation, $100.00 per share and dividends accumulated and in arrears thereon.

$4.00 cumulative preferred, without par value—Authorized, 1,500,000 shares; issued 757,642 shares less 200 shares reacquired and in treasury, outstanding 757,442 shares; maximum amount payable in liquidation, $50.00 per share and unpaid cumulative dividends.)

Common, without par value—Authorized 10,000,000 shares; issued and outstanding, 2,162,607 shares . . . . . $ 21,626,070.00

Total capital stock $108,977,013.35

Surplus—see Foot-Note F:

Capital surplus $111,173,241.67
Surplus account 13,633,470.71

Total surplus $124,806,712.38

Total liabilities, capital and surplus $311,697,030.73

See Foot-Note G as to Contingent Liabilities.

In *In re Rieger, Kapner & Altmark,* 157 Fed. 609, frequently cited and followed, the court held that a corporation was a mere agency and department of a partnership between individuals and on the bankruptcy of the partnership the court took over all the assets of the corporation and administered them for the benefit of the creditors of the partnership. The court said:

> "The individual partnership creditors have a direct interest in the corporate assets, for, assuming, without deciding, that the innocent corporate creditors must first be paid out of the corporate property, the residue, if any, would pass for administration to the trustee in bankruptcy."

The Court further said:

> "In *Interstate Telegraph Co.* v. *Baltimore & Ohio Telegraph Co.,* (C. C.) 51 Fed. 49, affirmed in 54 Fed. 50, it appears that the railroad company caused the telegraph company to be incorporated, became the sole owner of its stock, selected its own officers and employees as officers of the new company, and represented such company to have authority to contract with reference to its whole railway telegraph system. It was held that the railroad company was not only the actual owner of the telegraph company but that the latter company was a mere department, or bureau, of the railroad company, created and maintained for the railroad company's benefit as an agent to make contracts. *It follows as a corollary that,* had the railroad company become insolvent while the telegraph company was in existence, the property in the possession of the telegraph company, notwithstanding its corporate entity, would, if necessary, *have been treated as property of the railroad company.*"

Elvin R. Latty, in his recent book entitled "Subsidiaries and Affiliated Corporations," page 42, says:

> "Sec. 9. *Administration of Subsidiary in Receiver-*

ship or Bankruptcy of Parent—'Turnover' Cases.
Since even the strict adherents of the absolutely separate-entity theory admit that some cases, *e. g., In re Rieger, Kapner & Altmark,* 157 Fed. 609, are inconsistent with such theory, one finds, as is to be expected, that cases which raise the problem involved in the *Rieger* case constitute a chief source of reliance in a situation to which the key is thought to be disregarding of corporate entities. Particular attention should be directed, therefore, to what courts are really doing in those cases. The problem raised by those cases is this: Corporation A is in receivership or in bankruptcy; either it owns all (or substantially all) the stock of corporation B or else its stockholders own the stock of B; have the creditors of A the right to have the property of B administered in the receivership on bankruptcy of A? The problem arises either upon the attempt of the receiver or trustee of A to extend his administration to the property of B or upon the attempt of the creditors of A to have a receiver appointed for B's property. An illustration of the typical approach to this 'turnover' of the property of one corporation to an official administrator of the property of a related individual or corporation is afforded by the case of *Central Republic Bank & T. Co.* v. *Caldwell,* 58 F. (2d) 721. There, on oral argument, counsel for both sides 'frankly admitted' that the allowance of the turnover should depend on the answer to this question: Was the subsidiary corporation, the turnover of whose property was at issue, 'an entirely separate and distinct entity or was it only an agency and instrumentality' of the parent? Case after case gives assurance that if the court 'finds' that the subsidiary is a 'mere agency or instrumentality' its property shall be turned over, otherwise not. The existence of 'absolute' (or 'active,' 'actual,' 'dominant,' 'unified,' etc.) control has been put forth consistently as the common factor running through the cases which fixes the status of the corporation as a 'mere agency or instrumentality,' and this control, in turn, has been demonstrated by certain indicia; the

bankrupts are officers and directors of the corporation, or the officers and directors are the same in both corporations, or, if there is no such identity, the officers and directors of both take their orders from the *same source;* an employee of the parent actively 'manages' the subsidiary, and the two are 'really' operated as if they were one. When all this exists, it is alleged, the law will disregard the separate entity of the two; then the turnover is considered but one of the consequences that follow, legally and logically, from such corporate *oneness.* Let one, however, consider whether there may not be some good reasons for the purported 'disregard' which is peculiar to the 'turnover' type of case. If no such reason can be found, then possibly one is forced to the conclusion that the earmarks of 'instrumentality' and 'agency' mentioned above are the determinative factors; that they have the effect in law comparable, let us say, to the physical result which follows the removal of a partition separating two compartments which contain similar liquids.

"If creditors of the parent corporation were permitted to subject the assets of the subsidiary to the payment of their claims, the result would be to make the subsidiary liable for the debts incurred by the parent, at least to the extent of the assets so subjected. This would clearly present a problem of inter-corporate vicarious liability, although in reverse aspect. (Ordinarily where inter-corporate vicarious liability is involved it is a question of the liability of the *parent* for claims against the subsidiary.) Significantly, from the point of view of one concerned with inter-corporate vicarious liability, one does not encounter turnover cases of attempted turnover of the parent's property to the receiver or trustee of the subsidiary. This would be closer to the inter-corporate liability problem. The typical turnover case involves turning over the assets of a *subsidiary to an administrator* of the parent. Although the two types of turnover are superficially similar, especially in the light of certain *dicta*, there are, under certain circumstances, significant differences between mak-

ing the property of the subsidiary available to creditors of the parent and making that of the parent available to creditors of the subsidiary."

—*Trustees System Co. of Pennsylvania* v. *Payne*, (3rd Cir. Apps.) 65 F. (2d) 103;
Central Republic Bank & Trust Co. v. *Caldwell*, (8th Cir. Apps.) 58 F. (2d) 721;
Hamilton Ridge Lumber Sales Corporation v. *Wilson*, (4th Cir. Apps.) 25 F. (2d) 592;
Commerce Trust Co. v. *Woodbury*, (8th Cir. Apps.) 77 F. (2d) 478;
In re Muncie Pulp Co., (2nd Cir. Apps.) 139 Fed. 546;
In re H. B. Lake Co., 5 F. Supp. 179;
In re Eilers Music House, (9th Cir. Apps.) 270 Fed. 915;
Day v. *Postal Tel. Co.*, (Md.) 7 Atl. 608;
Adams v. *Morgan*, 52 P. (2d) 643.

Suppose the Court should hold the Deep Rock is a department of the Standard and *disallows the Standard's claim in its entirety*, and acting on that decision the Federal Court in Delaware takes over all the Deep Rock's assets and administers them for the benefit of Deep Rock's and Standard's creditors, *where will that leave the Deep Rock's stockholders?* It may be argued that the Standard's creditors did not extend credit to the Standard on the faith of Deep Rock's assets and are therefore not entitled to participate in the Deep Rock's assets. Well, it may be argued with equal force that the Deep Rock's creditors did not extend credit to the Standard on the faith of Standard's assets or in reliance upon Standard paying their claims.

But if we are going to scramble the Standard and the Deep Rock together there is no escape from the conclusion that Standard and Deep Rock creditors will participate mutually in the assets of both corporations.

In view of Standard's financial condition the instrumentality rule, if applicable, may be a boomerang and in our view the Deep Rock's creditors, entitled to first consideration, should not be imperiled by a final adjudication of this question as Standard is willing to waive its claim and substitute therefor common stock of the New Company. "For what is a man profited, if he shall gain the whole world, and lose his own soul?" St. Matthew, chapter 16, 26th verse. And what about the dog in Aesop's fables, crossing the bridge over a stream with a piece of flesh in his mouth, and upon seeing his own shadow in the water, dropped his meat and leaped in after the other dog and came up with *nothing?* Since Standard is subject to 77-B bankruptcy it may be that the Trustee has a bear by the tail.

Although, as said by the Court in *Forbush Co.* v. *Bartley,* 78 F. (2d) 805-808, *supra,* the transactions between corporations "closely affiliated" will be "rigidly scrutinized" and the burden is on the dominating corporation to sustain its claim as a creditor, nevertheless *there is no* presumption that the dominating corporation (Standard) fraudulently advanced money to the subsidiary (Deep Rock) or fraudulently paid claims of third parties against Deep Rock. *Intelligent self-interest refutes any such presumption.* The rule that "No man can serve two masters" has no application to payment of claims of third parties.

(G) The United States Circuit Court of Appeals for the Eighth Circuit, in *Post* v. *Buck's Stove & Range Co.,* 200 Fed. 918, 43 L. R. A. (NS) 498-502, said:

> "The courts favor settlements of controversies, *both before and after* litigation, and will rarely overhaul them with a critical eye."

In *Pacific Mutual Life Ins. Co.* v. *Coley,* 62 Okl. 161, 162 Pac. 713, the court said, "It is the policy of the law to

encourage the settlement and compromise of controversies in order to discourage litigation."

It is respectfully submitted that the judgment of the court below should be affirmed.

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Tulsa, Oklahoma,
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Of Counsel.

TRUSTEE'S CHRONOLOGICAL STATEMENT OF PROCEEDINGS IN DISTRICT COURT.

May It Please the Court:

I believe a chronological statement of important dates and progressive steps disclosed by the voluminous record will be of assistance to the Court.

(NOTE: All italics are mine unless otherwise noted.)

Important Dates.

1.

On the petition of John L. Gray and L. B. Riddle, the District Court of Tulsa County, Oklahoma, appointed E. H. Moore receiver of the Deep Rock Oil Corporation on February 28, 1933. (R. Vol. 2, p. 245)

2.

On the removal of the case to the United States Court for the Northern District of Oklahoma H. N. Greis and E. H. Moore were appointed receivers of Deep Rock Oil Corporation on March 2, 1933. (R. Vol. 2, pp. 245 and 687)

(NOTE: It will be noted that the petition filed in the State Court named not only Deep Rock Oil Corporation a party defendant, but also the Deep Rock Oil and Refining Company, hereafter referred to as Refining Company, and also Standard Gas and Electric Company and the Oklahoma Gas and Electric Company. Plaintiffs undertook to get jurisdiction of the Standard by attachment against its stock ownership in Oklahoma

Gas and Electric Company, and prayed for the writ. Plaintiffs also prayed for a judgment of $8,756,719.50 against the Standard in favor of Deep Rock, and for the appointment of a receiver for the Deep Rock. It was orally agreed between counsel for the Standard and plaintiff's counsel that the action against the Standard and the Oklahoma Gas and Electric Company would be dismissed on condition the Standard would intervene and litigate the validity of its claim against the Deep Rock in the Federal Court for the Northern District of Oklahoma.)

3.

Standard kept its agreement and on August 15, 1933, filed its petition in intervention in the federal equity receivership case. (R. Vol. 2, p. 245)

(NOTE: The Standard's petition in intervention sets forth a claim for a balance of $9,342,642.37 against the Deep Rock, and is identically the same claim filed in the 77-B Bankruptcy proceeding. (R. Vol. 2, p. 266))

4.

On November 28, 1933, the receivers filed their answer and counterclaim to the Standard's petition in intervention. (R. Vol. 2, p. 245)

(NOTE: The receivers' answer and counterclaim (R. Vol. 2, pp. 276-290) averred that a Special Master should be appointed to hear all the evidence for and against the Standard's claim, with directions to report all the evidence to the Court. The receivers attacked the validity of the October 1, 1925, and December 20, 1930 Refining Company leases and averred that the Deep Rock, the Refining Company, and Byllesby Engineering and Management Corporation "are each, and have been at all times herein mentioned, mere agents, instrumentalities and adjuncts of the Standard, utilized by the Standard for the purpose of transacting the Standard's business in Oklahoma," and *that the separate corporate entity "should be judicially ignored*

and a proper and equitable judgment and decree entered in this cause adjudging the Standard indebted to the Deep Rock" in the sum of $8,756,719.50, with interest thereon from the interest bearing dates "as determined by the Master and approved by this Court." (R. Vol. 2, p. 290))

5.

The first hearing before the Special Master commenced on May 28, 1934, in Chicago, at which time the Standard placed on the witness stand Mr. O'Brien, Majewski, Graf, Cummins, Francisco, Bull, Morrison, Cross, McCune, Lynch, Knourek and Braheney, Standard or Deep Rock officers and employees. (R. Vol. 2, pp. 1 to 102)

6.

Further testimony was taken before the Special Master beginning on June 18, 1934, at Tulsa. (R. Vol. 2, p. 102)

7.

On the next day, June 19, 1934, the Deep Rock filed its 77-B Petition in Bankruptcy in the United States Court at Tulsa. (R. Vol. 1, pp. 36-41)

8.

On June 22, 1934, the Standard filed its proof of claim in the Bankruptcy case, with Exhibit "A" attached thereto, being an exact copy of Exhibit "A" to Standard's claim filed against the receivers. (R. Vol. 1, pp. 51 to 64)

9.

On June 22, 1934, counsel for the Trustee and Standard filed a Stipulation reciting that Honorable Preston C. West had been appointed Special Master in the receivership case and that there had been evidence introduced before the Master prior to June 19, 1934, the date the 77-B petition in bankruptcy was filed by Deep Rock, and stipulating that the testimony taken before the Special Master in the receivership case should remain in the record as evi-

dence before him as Special Master in the Bankruptcy (R. Vol. 1, p. 65)

(NOTE: The Trustee's original objections t Standard's claim do not appear to be in the recor the stipulation recites that "Whereas, the Truste filed his objections to the allowance of the Stand claim; and, WHEREAS, the court in the above s cause (Bankruptcy No. 2318) has appointed Hono Preston C. West, Special Master, with authority to the evidence in support of and in opposition to Standard's said claim," etc. (R. Vol. 1, p. 66))

10.

On June 19, 1934, the Court entered an order appo ing H. N. Greis, temporary Trustee (R. Vol. 1, pp. 47- and thereafter and on July 9, 1934, entered another o making Greis' appointment permanent. (R. Vol. 1, p. 67

11.

The parties continued to introduce evidence bef the Special Master orally and by written interrogatories answers. (R. Vol. 2, p. 37) All the witnesses introduced the Standard and the Trustee were Standard and D Rock officers and employees. Every one of the witnes was an officer or employee in the Byllesby group. The ceivers put on the witness stand the following officers the Standard, to-wit, Morrison, Lehmkuhl, Pohl and Li it being agreed that two other Standard officers, McKay a Madden, would testify to the same course of conduct d closed by the testimony of the aforesaid witnesses. (R. V 2, pp. 99 to 151) After the court reporter would transcri the oral testimony of witnesses the Trustee's counsel wou examine the testimony carefully and prepare written inte rogatories addressed to Knourek, Francisco and Ke (Master's Report, Vol. 1, pp. 166-167), deliver these inte rogatories to the aforesaid witnesses, and receive from the

their carefully prepared answers. (R. Vol. 2, p. 391) These interrogatories called for information disclosed by the books and records of the Standard and the Deep Rock, and for this reason it was not feasible to put them on the stand as they would have to be excused from time to time for an examination of the books.

12.

On August 9, 1934, the debtor, filed a petition stating that in pursuance of the provisions of Section 77-B of the Bankruptcy Act the debtor intends to propose to the court a Plan of Reorganization of the Deep Rock at a hearing on a day to be set by the Court, and stated the name and address of the Reorganization Committee, and attached as Exhibit "A" to the petition the Committee's Proposed Plan of Reorganization. (R. Vol. 1, p. 68)

13.

The court on the same day, August 9 ,1934, entered an order directing the debtor to give notice to the creditors and stockholders, etc., of a hearing on August 20, 1934. (R. Vol. 1, p. 71)

14.

On the same date, August 9, 1934, the members of the Reorganization Committee filed their petition. (R. Vol. 1, pp. 72-77)

15.

On the same date, August 9, 1934, the court entered an order allowing the intervention of Shinners, Frye, Holden, Mason, Murphy and Robertson, as members of the Reorganization Committee. (R. Vol. 1, p. 78.)

16.

On August 20, 1934, the debtor filed a petition entitled "Petition of Debtor Proposing Plan of Reorganization for its consideration by the Court," and prayed the court that

it make a finding that the Plan of Reorganization of the Debtor was filed August 9, 1934, in good faith, that the Court approve and confirm the action of the Debtor in proposing a Plan of Reorganization, but that the matter of hearing on the confirmation of the Plan be deferred until a later date to be fixed by the Court; also prayed that the Reorganization Committee be authorized and instructed by the Court to submit the Plan to the stockholders and creditors and all parties in interest "for the purpose of securing consents to and acceptances of said Plan of Reorganization." (R. Vol. 1, pp. 79 to 82)

17.

On August 20, 1934, the Court entered an order approving "the action of the Debtor in proposing a Plan of Reorganization" but ordering "that the Plan of Reorganization of the Debtor be not confirmed," and the hearing on confirmation be deferred until a later date to be fixed by the court. The Reorganization Committee was authorized and directed to present the Plan to all creditors and stockholders and parties in interest "for the purpose of affording said creditors and stockholders, and all parties in interest, of the Debtor, to accept or decline to accept said Plan and for the further purpose of securing written consents to and acceptances of said Plan of Reorganization." (R. Vol. 1, 82)

18.

On November 19, 1934, the Trustee filed a petition for an order directing all claims of creditors and evidence of interest of stockholders to be filed or evidenced on a date to be designated by the court. (R. Vol. 1, p. 88)

19.

On November 19, 1934, the court entered an order "Determining time and manner in which claims of creditors and interest of stockholders may be filed or evidenced," and provided therein that claims filed with the receivers prior

to that date shall be deemed to have been filed for the same principal amounts set forth in such claims, etc. Section 11 of the order provided that

> "Objections in writing to the allowance of any claim of a creditor may be filed with the trustee on or before February 20, 1935, by any party in interest desiring to make such objection. Objections in writing to the allowance of any evidence of a stockholder may be filed with the trustee on or before February 20, 1935, by any party in interest desiring to make such objection." (R. Vol. 1, pp. 90-94)

20.

The last hearing before the Special Master was on February 13, 1935 (R. Vol. 2, p. 218), and both parties closed the introduction of evidence on that date. (R. Vol. 2, p. 241)

21.

On February 21, 1935 (R. Vol. 1, p. 96), John M. and William H. Taylor filed a document entitled "Objections of preferred stockholders to claim of Standard Gas and Electric Company" stating that it was filed "in pursuance of the order of this court entered in the above-entitled cause on November 19, 1934, as order number fifty-six thereof, and in particular, Section Eleven thereof." The objections stated that William H. Taylor was then the owner of record of 300 shares, and John M. Taylor was the owner of record of 250 shares of "Seven Dollar Cumulative Convertible Preferred Stock of said debtor corporation." They also stated that the preferred stock upon liquidation was entitled to a sum "equivalent to One Hundred Dollars per share, in addition to the payment of all cumulative dividends," which cumulative dividends amounted as of February 28, 1933, to the sum of $758,333.33. They also correctly stated that there were outstanding 50,000 shares of preferred stock of the debtor corporation, 969 shares of which were owned by the

Standard and the remainder by the public at large.
also alleged

"*That the position of the Trustee, appointe*
this Honorable Court, in the above-entitled cause
representative of the Creditors of said corporation
not permit of his protection of the interests of the
ferred Stockholders. That, in all events, it is impr
cable and undesirable that the Trustee should see
protect conflicting interests in the same litigation."
the allowance or disallowance of the claim of
Standard Gas and Electric Company affects subs
tially the rights of the Preferred Stockholders in th
sets of said Debtor corporation. That the differenc
tween the allowance or disallowance of the claim
said Standard Gas and Electric Company in the
of $9,342,642.37, or in any other sum of substan
amount, may mean the difference between the prese
tion or destruction of the greatest portion of the eq
of the holders of the Preferred Stock in the assets
said debtor corporation.

"That for the adequate protection of these ob
tors and the owners of Preferred Stock of said deb
corporation as a class, it is necessary and desirable t
these objections be deemed as filed in behalf of th
objectors, and in behalf of all of the holders of the P
ferred Stock of said debtor corporation.

"*Four.* Objectors herewith object to said claim
said Standard Gas and Electric Company *for the re*
sons and in the manner and extent set forth by the o
jections filed to said claim in behalf of the Trustee he
in as amended from time to time, reference to which o
jections are hereby prayed and which said objectio
as amended are incorporated herein and made a pa
hereof as fully as if set forth in full herein. That, in a
dition to the items to which objection is made by sa
Trustee, these objectors object to all other items co
tained in said claim for the reasons that the advanc
ments claimed by said Standard Gas and Electric Com
pany *were never in fact made,* except as bookkeepin
transactions, and that, to the extent that any such ad

vancements were made the said advancements were, in effect, advancements by the Standard Gas and Electric Company to itself for which no claim can be properly filed in these proceedings." (R. Vol. 1, pp. 97-98)

They also alleged that the Deep Rock was a mere *alter ego* of the Standard, a department and adjunct of the Standard, and that the Standard's claim should not be allowed for any amount. *They also objected to the Plan of Reorganization, the original Plan.* (R. Vol. 1, pp. 96 to 99)

22.

On February 22, 1935, the next day, the Taylors filed a petition for leave to intervene, to which they attached as Exhibit "A" a copy of their objections to the Standard's claim filed on February 21, 1935. (R. Vol. 1. 99 to 101)

23.

On February 25, 1935, the Court entered an order granting "permission to intervene herein for the purpose of presenting their claim and for the purpose of protecting their rights as the owners and holders of Seven Dollar Cumulative Convertible Preferred stock of the Debtor." (R. Vol. 1, pp. 101-102)

24.

The Trustee's counsel refused to discuss a settlement or compromise of the Standard's claim before all the evidence for and against the claim had been submitted to the Special Master. The testimony before the Special Master was closed on February 13, 1935. (R. Vol. 2, pp. 218 to 242) On the bottom of page 241 of R. Vol. 2, it appears that a "Stipulation" of facts was then introduced in evidence, and page 242 shows the stipulation in regard to Standard's claim was filed February 13, 1935.

25.

After all the evidence was introduced before the Special

Master negotiations for a compromise of the Standard's claim were initiated by Mr. Shinners, a member of the Reorganization Committee, and George Knourek, an employee of the Standard or the Engineering and Management Corporation, no matter which, by interviews and conversations with the Trustee's counsel. Exhibit 5 to the Special Master's report (R. Vol. 1, p. 207), there abbreviated, is set out in full as Exhibit "B" to the Trustee's reply to the petition of the Taylors for an order directing the Trustee to amend his amended objections to the Standard's claim. (R. Vol. 1, p. 238) The "Memorandum of Conversations" about a compromise was immediately dictated at the close of negotiations between Shinners and Knourek, on one hand, and the Trustee's counsel on the other, and this was done for the purpose of preserving the exact basis of the proposed compromise. After this Memorandum was prepared, Shinners and Knourek left for Chicago. (See Shinners' testimony, R. Vol. 2, p. 297) The Memorandum of Conversations between Shinners and Knourek, on the one hand, and the Trustee's counsel on the other, is of sufficient importance in view of Petitioners' attack that we herewith quote it in full (R. Vol. 1, pp. 238 to 241):

"MEMORANDUM OF CONVERSATIONS BETWEEN JACK SHINNERS AND GEORGE KNOUREK, ON THE ONE HAND, AND GEO. S RAMSEY, EDGAR A. DE MEULES AND VILLARD MARTIN, REPRESENTING THE TRUSTEE IN THE ABOVE-STYLED CAUSE, PERTAINING TO TENTATIVE BASIS FOR AN AGREED JUDGMENT ON STANDARD'S CLAIM.

"The evidence shows that the original cost of the Bradstreet properties was $650,000.00, $500,000.00 of which was paid by Standard's checks, and $150,000.00 paid by Deep Rock's notes, whereupon Standard gave Deep Rock credit for $150,000.00 on its open account.

and charged the $650,000.00, or more accurately speaking, $649,999.00, to the account of J. C. Kennedy, Trustee, in whose name as trustee the Bradstreet properties were purchased.

"The Deep Rock Oil Corporation (hereinafter referred to as Deep Rock) expended in the development and acquisition of additions to the Bradstreet properties the sum of $1,033,294.32 from the date of their acquisition in February, 1923, up to October 1, 1925, and also expended in the name of R. J. Graf, Trustee, in the construction and installation of Dubbs cracking stills and auxiliaries thereto the sum of $861,297.79 up to October 1, 1925, making $1,894,592.11. This makes a total ($649,999.00, $1,033,294.32, and $861,297.79) of $2,544,591.11.

"It also appears from the evidence that the Standard charged the Deep Rock with the rentals accruing under the October 1, 1925 lease executed by the Deep Rock Oil and Refining Company as lessor and the Deep Rock as lessee, the total sum of $1,475,000.00 up to and including January 31, 1928, which was absorbed and paid by the issuance of Deep Rock common stock to Standard on April 12, 1928.

"It also appears from the evidence that in December, 1925, Standard credited (as of October 1, 1925) Deep Rock with the cost of the original Bradstreet properties, $649,999.00, as the consideration for 8,325 shares of the Deep Rock Oil and Refining Company's stock standing in the name of M. A. Morrison, *et al.*, and also at the same time credited Deep Rock on its open account with the sum of $1,894,592.11 (the cost of the cracking plant and development and leases in addition to the Bradstreet properties) and charged the $1,894,592.11 to the Deep Rock Oil and Refining Company on open account and thereafter and on January 1, 1931, received from the Deep Rock Oil and Refining Company its note for $1,894,592.11 with interest from date at the rate of seven per cent per annum, which gives the following set-up:

(a) Original cost of Bradstreet properties	$	649,999.0
Interest thereon from October 1, 1925, at simple 5 per cent to February 28, 1933		241,041.2
Total	$	891,040.2
(b) Deep Rock Oil and Refining Company note of January 1, 1931	$	1,894,592.1
Interest at 7 per cent from January 1, 1931, to February 28, 1933		287,352.7
Total	$	2,181,944.8
Total of above figures	$	3,072,985.1
Less Refining Company rentals charged prior to February, 1928		1,475,000.0
Balance	$	1,597,985.1

"The above sum of $1,597,985.18 shall be allowed Standard on its claim, but subordinate and inferior to the prior rights of Deep Rock's creditors, including the holders of the $10,000,000.00 Deep Rock notes issued under date of March 1, 1928, and maturing March 1, 1933. The interest on the $10,000,000.00 March 1, 1928 notes is to be computed at the stipulated annual rate of six per cent up to the date of the decree in this case, and the interest on the $649,999.00, above specified is to be computed at the simple rate of five per cent per annum from February 28, 1933, to the date of the decree and added to the $241,041.29, interest up to February 28, 1933, and the total subordinated and postponed to the first payment of the $10,000,000.00 March 1, 1928 notes and bona fide claims of other Deep Rock creditors.

"*In accordance with the itemized tabulation furnished by George Knourek and Mr. Shinners it appears* that Standard has paid to third parties on account of Deep Rock (excluding H. M. Byllesby and Company and

all affliated companies) the sum of $2,376,076.31, upon which interest has been computed at the simple rate of five per cent per annum from the dates of the advances to February 28, 1933, in the sum of $407,886.18, making a total of $2,783,962.49. The above stated principal sum of $2,376,076.31 is to be allowed Standard on its claim as an indebtedness (with five per cent interest thereon) of equal rank and parity with the $10,000,000.00 March 1, 1928 notes and other creditors, and interest is to be computed upon the principal, to-wit $2,376,076.31 at the annual rate of five per cent per annum from February 28, 1933, to date of decree, and added to the $2,783,-962.49. The Standard is to transfer to the Trustee in Bankruptcy the 9,000 shares of the Deep Rock Oil and Refining Company stock and cancel and surrender to the Trustee Refining Company's note of January 1, 1931, for $1,894,592.11 and cancel all claims of all kinds and character against the Deep Rock Oil and Refining Company. The Standard's claim is to be reduced to the sum of $2,376,076.31, and allowed on a parity with the $10,000,000.00 March 1, 1928 notes, and claims of other creditors, with interest at the rate of five per cent per annum added thereto as above stated, and in addition thereto, the Standard shall be allowed the sum of $1,597,985.18, with interest at the rate of five per cent per annum on that portion thereof attributable to the Bradstreet item, from February 28, 1933, as above stated, and interest at the rate of seven per cent per annum upon the portion thereof attributable to the note of the Deep Rock Oil and Refining Company from February 28, 1933, to August 5, 1933, at which time a credit of $12,500.00 was given upon said note by reason of payments made to Standard by the Refining Company, and leaving a balance of $1,585,485.18 upon which interest shall be calculated at the rate of seven per cent per annum from August 5, 1933; all of which principal and interest is to be subordinated to the first and prior rights of Deep Rock's other creditors and in no manner share in the assets of the Deep Rock until after the $10,000,-000.00 March 1, 1928 notes and the $2,376,076.31 allowed

Standard have been paid, with interest thereon at
rate above stated.

"All the assets of the Refining Company shall
come the property and assets of the Deep Rock and
ject to the claims of the creditors of the Deep Rock

"If this basis of settlement is accepted by the T
tee and Standard then a formal settlement agreem
is to be drafted, and executed by counsel of record
the Trustee and Standard, subject to the court's
proval. Also R. J. Graf, Trustee, shall execute and
knowledge a deed to the trustee conveying all the
covered by the Deep Rock's deed to Graf of date of
cember 6, 1922, which deed is to be attached to the
tlement agreement and delivered to the Trustee u
the court's approval; if no court approval, the dee
to be returned to Graf.

"Dated this 21st day of February, 1935." (R.
1, p. 238)

(NOTE: Standard's Second Offer of Comp
mise was based on these same figures but it
posed to eliminate itself as a creditor for comm
stock.)

Shinners testified (R. Vol. 2, p. 397) that he did not r
resent the Standard in negotiating the *tentative compro*
agreement with the Trustee; that the Standard was rep
sented by its counsel, Mr. Gibson and Mr. Campbell;
that "The proposed compromise with the trustee was s
mitted to the Standard's Board of Directors and to its
ecutive Committee." Shinners testified (R. Vol. 2, p. 3
that the Trustee's counsel told him they would not disc
compromise or negotiations until all the evidence was clos
and that Ramsey told him more than that—"You told
Standard had no claim"; that Standard had nothing
compromise.

Shinners testified (R. Vol. 2, p. 398) as follows:

"Something was said that there might be basis

settlement on what the Standard had actually paid other persons for account of the Deep Rock, that is paid out money to persons other than Standard or any Bylesby interests. *Mr. Knourek made up a statement of those claims that had been paid by the Standard.* That was the purpose of bringing him back the following week."

Shinners testified (R. Vol. 2, p. 451):

"As far as the figures used in this compromise, the figure of Two Million Three Hundred and Seventy-six Thousand, that was a figure agreed upon by the Trustee and Standard. That particular figure was the amount of money Standard advanced to Deep Rock, either direct or to third parties for the benefit of Deep Rock. The figure of One Million Five Hundred and Eighty-five Thousand represents the amount approximately that Standard invested in Refining Company that remained unpaid on the date of receivership, or had not been returned to Standard. The parties who negotiated this compromise took those two sets of figures and said that was going to be the basis of compromise. I didn't do it."

Petitioners knew the Trustee didn't know anything about these figures or any of the other figures and entries in the Standard's account except in a general way. Shinners did not testify that the Trustee "negotiated this compromise." The Trustee had nothing to do with the second proposed compromise, nor did he negotiate the first proposed compromise. But Petitioners' counsel seem anxious to smear the Trustee and make it appear that he initiated the first and second compromise.

26.

On March 8, 1935, the Trustee filed his "Amended Objections" to Standard's claim (R. Vol. 1, pp. 108 to 134) in which the Trustee made several objections to a number of the items in Standard's claim, item by item, again attacked

the Refining Company leases as a fraud, and objected to the whole claim and every item therein contained, and among other things the Trustee's Amended Objections averred:

> "The Trustee avers that both of said leases shown by Exhibits A and B hereto were fraudulent devices contrived by Standard in order to enrich itself to the great injury of the Deep Rock and its stockholders and creditors; that both of said leases should be adjudged unconscionable, fraudulent, and as such, null and void; that the rentals paid by the Deep Rock accruing under said leases *before and after* February 29, 1928, should be treated as payments on Standard's open account balance against Deep Rock after eliminating all debits in Standard's account therein contained for rentals under said leases; that the $3,050,000.00 rentals charged in Standard's open account after January 31, 1928, and shown by Exhibit A to its claim, should be disallowed and all the interest charged by Standard on said unpaid rentals should be disallowed, and the interest charged by Standard on its open account against Deep Rock for interest on the rentals paid by the *$500,000.00* heretofore pointed out should also be eliminated and disallowed and the *$500,000.00* paid as rentals since April, 1928, should be *adjudged payments* on Standard's open account balances after eliminating all rental debits and charges. (R. Vol. 1, pp. 121-122) • • •
>
> "Your trustee also objects to the 15th item in the debits and charges in Exhibit A to Standard's claim, to-wit, 'Interest on open account balances, $4,819,222.07,' because said interest is illegal and unlawful in that it was charged into Standard's open account monthly balances against Deep Rock at the rate of seven per cent per annum, which was in effect compounding the interest. (R. Vol. 1, p. 123) • • •
>
> "That all of item 15 in Exhibit A to Standard's claim entitled 'Interest on open account balances, $4,819,222.07' should be disallowed and interest calculated at the annual rate of five per cent substituted therefor; that no interest, either at seven per cent, compounded

or uncompounded, or at the rate of five per cent per annum should be allowed on any of the debits composing the 26th item in Standard's debit column of Exhibit A to its claim, to-wit, 'Deep Rock Oil and Refining Company rentals, $4,525,000.00'; that neither your trustee nor the Deep Rock is estopped or bound by any of the payments made on interest charged by the Standard because the Deep Rock never had any free and independent will of its own; that the credits allowed Deep Rock by Standard on interest charges were not earmarked 'interest payments' by Deep Rock; that all credits given Deep Rock by Standard as payments of interest should be treated by the court, and so adjudged, as credits on Standard's claims, *if any*, and the open account balance against Deep Rock.

"The trustee objects to the 21st item of debits in Exhibit A to Standard's claim, entitled 'Byllesby Engineering and Management Corporation supervision fee, $1,219,034.83,' for the following reasons:" (R. Vol. 1, pp. 123-124) • • •

"Your Trustee further avers that the Standard exercised its power of control over the Deep Rock so as to make the Deep Rock its agent and adjunct and one of its departments; that the Standard has not used its ownership of Deep Rock stock for the purpose of participating in Deep Rock's affairs *in the normal and usual manner*, but at all times has used its stock ownership so as to make the Deep Rock in fact a mere agency, instrumentality and department of the Standard; that Standard, since March, 1921, has used its power of control over the Deep Rock so as to deprive the Deep Rock of all real, independent existence, and your trustee avers that this court should disregard the separate corporate entity of the Deep Rock and the Standard and hold and adjudge the Deep Rock to be a department of the Standard; that on account of the matters herein alleged the Standard's claim in its entirety should not be allowed to participate in the Deep Rock's assets on a parity with other creditors.

"Referring now to Standard's 'Proof of Debt' claim in this case, the Trustee says that he denies th there are no offsets or counterclaims against Standard claim; denies that the Deep Rock was or is indebted the Standard in the sum of $9,342,642.37, with interes *or any other sum;* denies that Deep Rock has no ju credits, deductions or offsets against Standard's clain denies that there is justly due Standard the aforesai sum of $9,342,642.37, with or without interest; denie that the Deep Rock requested Standard to buy for it account 11,000 shares of preferred stock of the *Utilitie and Industrial Corporation;* denies that the interes upon Standard's open account balances is $4,819,222.0 or any other sum; denies that Deep Rock is liable t Standard for the sum of $1,555,981.00 *as dividends* o preferred stock; denies that Deep Rock is indebted t Standard for dividends on common stock in the sum o $1,946,672.00, or any other sum, denies that Deep Rock i or ever was indebted to the Standard for the sum o $4,525,000.00 as Refining Company rentals, and denies it was obligated to pay Standard, or ever indebted to Standard, for any Refining Company rentals; admits that Standard purchased from the Deep Rock 222,448 shares of its common stock in April, 1928, and avers that said purchase was at the price of $50.00 per share, fixed by Standard itself, with which Standard credited Deep Rock on its, Standard's open account; denies that the effect of said transaction was the voluntary cancellation by Standard of its indebtedness against Deep Rock to the amount of $20,222,400.00, or any other sum; admits that the Standard surrendered 90,000 shares of Deep Rock's preferred stock in exchange for Deep Rock's common stock, but denies that this was a voluntary donation by Standard to Deep Rock.

"The trustee states that a Master has already been appointed and that the evidence has been taken in support of and in opposition to Standard's claim, and the trustee *prays that the court find and adjudge that the Deep Rock was a department of the Standard, and that Standard's entire account be disallowed;* that, if the

court finds the Deep Rock was not a department of the Standard, then all those items in Standard's claim herein objected to by the trustee be disallowed and eliminated from Standard's claim and *subordinated to the first and prior lien of the Deep Rock's other creditors on the Deep Rock's assets,* and that the court find and adjudge that all the properties of the Refining Company are properties of the Deep Rock and liable for the Deep Rock's debts.

"The trustee prays for all such other and further relief as he may be entitled to under the pleadings and under the evidence." (R. Vol. 1, pp. 132-134)

27.

Under date of March 8, 1935, the Standard submitted to the Trustee an Offer of Compromise, duly executed by the Standard, which is clearly based on the "Memorandum of Conversations" between Shinners and Knourek, on the one hand, and Trustee's counsel on the other. (R. Vol. 1, p. 105) The Trustee, over his signature at the bottom of the offer, recommended to the Court "the acceptance and approval of the above offer of compromise and settlement."

The Standard's *First* Offer of Compromise of March 8, 1935, was as follows (R. Vol. 1, pp. 105-107):

"OFFER OF STANDARD GAS AND ELECTRIC COMPANY IN COMPROMISE AND SETTLEMENT.

"In the above cause all of the matters contended by either party are contested by the other and have not yet been determined and recognizing the urgent necessity for an early termination of the litigation and the reorganization of the Deep Rock Oil Corporation, Standard Gas and Electric Company, as a compromise and settlement only, offers, subject to the final approval of this compromise, to receive in satisfaction of its claim herein:

(a) The principal sum of $2,376,076.31;
interest on said principal sum at the rate of five per cent per annum from the dates of the several advances constituting said sum to February 28, 1933, being 407,886.18;
and in addition thereto interest on said principal sum of $2,376,076.31, at the rate of five per cent per annum from February 28, 1933, to the date of entry of judgment on this offer; the aggregate of such amounts to be on a parity with the $10,000,000 principal amount of notes of Deep Rock Oil Corporation, dated March 1, 1928, and interest thereon at the rate per annum allowed by the court in this cause from March 1, 1933, to date of entry of judgment on this offer, and with other indebtedness of Deep Rock Oil Corporation to other persons; and

(b) the sum of $1,585,485.18
with interest on $1,597,985.18 from February 28, 1933, at five per cent per annum simple interest to August 5, 1933, and interest on $1,585,485.18 at five per cent simple interest per annum from August 5, 1933, to the date of entry of judgment on this offer, which judgment for the principal sum of $1,585,485.18, with interest as specified, shall be subordinated to the claims of all other creditors of Deep Rock Oil Corporation, including the holders of ten million dollar note issue.

"Standard also offers as a part of this compromise to cause the entire issued and outstanding common

stock of the Deep Rock Oil and Refining Company, consisting of 9,000 shares, to be transferred to the trustee herein, or to Deep Rock Oil Corporation, and to cause R. J. Graf, Trustee, to execute, acknowledge and tender a deed conveying to the Trustee or to the Deep Rock Oil Corporation, as may be determined, the land covered by the deed from Deep Rock Oil Corporation to said R. J. Graf, Trustee, dated December 6, 1922, together with the improvements thereon, which said deed and certificate for said 9,000 shares of common stock shall be attached to this offer and delivered to the trustee upon the approval of this compromise and settlement by the court. In the event of the approval of this offer of compromise and settlement the said deed and stock certificates shall be delivered to the Trustee, and in the event of the disapproval of this offer of compromise, shall be returned to said R. J. Graf, Trustee, and to Standard Gas and Electric Company.

"Standard Gas and Electric Company also offers as a part of this offer of compromise to *surrender* the promissory note of Deep Rock Oil and Refining Company dated January 1, 1931, in the principal sum of $1,894,592.11, and all other claims of Standard against Deep Rock Oil and Refining Company.

"This 8th day of March, 1935.

Standard Gas and Electric Company,
By John J. O'Brien, President.

H. N. Greis, Trustee herein, recommends to the court the acceptance and approval of the above offer of compromise and settlement. This 8th day of March, 1935.

(R. Vol. 1, p. 105) H. N. Greis, Trustee."

(NOTE: Standard's Second Offer of Compromise was based on these same figures, but it was to take common stock for all its claim.)

28.

On March 8, 1935, the Trustee filed his petition "for authority to compromise claim of Standard Gas and Electric Company." (R. Vol. 1, p. 102)

29.

On the same date, March 8, 1935, the court made an order referring the Trustee's said petition to Preston C. West as Special Master, with directions to set a day for hearing said petition and "to notify all creditors who have filed claims against Deep Rock Oil Corporation in the above proceeding of said hearing by mail at least ten (10) days before the date set for said hearing and to cause notice of the hearing to be published in the Chicago Tribune and the Tulsa Daily World," etc. (R. Vol. 1, pp. 107-108)

30.

On March 11, 1935, the Standard filed its reply to the Trustee's amended objections to its claim. (R. Vol. 1, pp. 143-148)

31.

On March 25, 1935, and after notice to creditors and stockholders, the Master had a hearing on the Trustee's petition for authority to compromise. (R. Vol. 2, p. 376)

32.

No creditor objected to the proposed compromise and the Taylors were the only objecting stockholders. On March 25, 1935, the Taylors filed their objections to the first proposed settlement of Standard's claim. (R. Vol. 1, p. 148)

33.

During the taking of testimony from time to time the Trustee's counsel was preparing an abstract of the evidence, that is, a narrative statement of the testimony and a condensation of the exhibits, etc., along with a brief on the law and facts. The narrative statement of the evidence had been prepared prior to the hearing before the Special Master on March 25, 1935, but otherwise as a brief it had not been finished as there were matters counsel for the Trustee intended to discuss. The abstract and brief was filed with the Special Master the latter part of March, 1935. At any

rate, we feel satisfied that the narrative statement and abstract of the record prepared by Trustee's counsel is accurate and that other counsel will not dispute its accuracy except with respect to conclusions of law and facts made by the Trustee's counsel. For this reason we are hereto attaching a copy of said "Trustee's Abstract of the Evidence, Analysis of Standard's Claim, and Brief in Support of his Objections to Standard's Claim" to Trustee's brief as Exhibit "B." It goes into the instrumentality question at length, and with a "vim."

(NOTE: A carbon copy of the Trustee's "Abstract of the Evidence," etc., shown by Exhibit "B" hereto, was delivered to counsel for the Taylors and Petitioners on September 23, 1935.)

34.

On May 11, 1935, the Special Master filed his report recommending that the Court "enter an order approving and accepting the proposed offer of compromise, and make and enter a decree settling the respective rights of Claimant, Standard Gas and Electric Company, and Debtor Corporation, in accordance therewith." (R. Vol. 1, pp. 164 to 202, and Exhibits thereto attached.) Among other things, the Master said (R. Vol. 1, p. 188):

"Until about the middle of February, 1935, it does not appear that any move had been made on the part of anybody concerned for any settlement of the controversy by way of compromise or composition. About that time Mr. J. J. Shinners, chairman of the reorganization committee took up the question with counsel for Trustee, and also discussed the same with counsel for claimant. Mr. Shinners made two trips to Tulsa and very earnestly urged some composition of their differences; and the wisdom and advisability of a compromise. A *memorandum of conversation* between Mr. Shinners and Mr. Knourek, on the one hand, and Mr. Ramsey, Mr. de Meules and Mr. Martin, representing the Trustee, touching a tentative basis for an agreed

judgment, has been filed with the Special Master. It is attached to this report, identified as Master's Exhibit Five, and it gives the *background for consideration of the pending offer made* by Standard Gas and Electric Company which has been recommended by the Trustee, and which constitutes the actual matter for decision at this time."

The Master also said (R. Vol. 1, p. 200):

"The Master, during his youth in Arkansas, many times heard the homely story of the fellow who spread his hoecake out so thin he couldn't turn it over, and lost the whole thing. If this proposed settlement be rejected, a very similar result might happen to one or the other of the parties to this controversy. *The Trustee is not dealing with his own individual affairs.* He is handling the rights and properties of *cestuis que trustent*. Personally, he might prefer to risk all the chips on a single draw, but it would seem that common sense and common justice demand a somewhat different course when other people's money is involved."

In his conclusions, the Master said (R. Vol. 1, p. 201):

"3. Unless the corporate walls separating Standard Gas and Electric Company from Debtor Corporation be utterly thrown down, Debtor Corporation be finally adjudged but a department of Standard Gas and Electric Company, the proposed compromise appears to be equitable from the standpoint of stockholders and creditors of Debtor Corporation, in that it only returns to Standard Gas and Electric Company the unpaid balance which upon accounting would probably be recovered by it, with a low rate of interst, and *purged* of any excessive or usurious charge; also, with about one-third of the amount agreed upon in settlement subordinated to the claims of all other creditors of Debtor Corporation."

35.

On May 29, 1935, the Taylors filed their exceptions to the Special Master's report. (R. Vol. 1, p. 211)

36.

Going back to the hearing before the Special Master on March 25, 1935, the record shows that counsel for the Taylors put me (referred to as Judge Ramsey in the record and briefs of Petitioners and the Reorganization Committee) on the witness stand in an effort to find out whether I knew anything about the law and facts of this case. Ever since the Taylors intervened in this case they seem to have the impression that everyone connected with the case, including the Trustee and his counsel, is either a knave or a fool, although they state in their petition to direct the Trustee to amend his pleadings (R. Vol. 1, p. 216):

> "9. That a determination on each of the issues upon which amendment is sought, as hereinbefore set forth, *will require no additional proofs* to the best of Interveners' knowledge and belief, and will serve to fairly present to this court the real issues and controversy under the facts already submitted in the record on these proceedings."

They asked me these questions (R. Vol. 2, pp. 381-382):

> "Q. Judge Ramsey, is it your position that if Deep Rock was an adjunct or instrumentality of Standard, that in such event the trustee would have no claim against Standard for the full amount outstanding against Deep Rock?
>
> A. No, I don't take that poition.
>
> Q. What position do you take in that regard?
>
> A. I take the position if the Deep Rock is a department of the Standard, Standard's claim ought to be disallowed; that the ten million dollar note holders come in, they are entitled to these assets, subject to their debts, which I think is entirely sufficient to pay them, and my curbstone opinion is a court of equity would subject these assets to payment of the $10,000,000.00. If that don't pay it, of course, they might get it out of Standard. You remember Standard has got

an awfully big bond issue; several million dollars outstanding bonds."

I also testified on that occasion (R. Vol. 2, p. 381):

"I don't know of any reason why there should n be a claim in this case made against Standard, not on that the claim that they make should not be allowe but that they should be held liable for all debts of Dee Rock. I think I have got that position taken in m *brief;* insist on that very point. You remember Stan ard has an awfully big bond issue, several million do lars of outstanding bonds."

Turning now to page 357 of Exhibit "B" hereto, m brief filed before the Master, and referred to in my test mony before the Master, will be found in black type, s Point Five, the following:

"*Standard exercised its power of control over th Deep Rock so as to make the Deep Rock its agent an adjunct and one of its departments, and for this reaso whatever amount is allowed Standard on its claim file in this case should be subordinated to the claim of th holders of the March 1, 1928 $10,000,000.00 Deep Roc notes and claims of other creditors, and participatio in the assets of the Deep Rock postponed until th claims of all other creditors have been fully satisfie therefrom, and if Deep Rock's assets are insufficient t pay all of its creditors, then the Standard should b adjudged primarily liable to pay Deep Rock's $10,000 000.00 March 1, 1928 notes and all other claims agains it.*"

37.

On June 3, 1935, the Taylors filed a "Petition to direc Trustee to amend pleadings and to have Standard claim re ferred back for findings of fact and law." (R. Vol. 1, p. 214 In this they allege that "for the full protection of the Cred itors and Preferred Stockholders," the Trustee's pleading should be amended "in such manner as will enable a de

termination on whether or not said Standard is liable to the Debtor Corporation, over and above any indebtedness to it in the sum of approximately $25,000,000.00 for illegal withdrawals of *capital investments.*" (R. Vol. 1, p. 214) They also allege (R. Vol. 1, p. 215):

> "4. That, in the objections of the Trustee to said Standard claim, it is set forth that said Deep Rock is the *alter ego* or instrumentality of Standard. That said contention in behalf of said Trustee is made only for the purpose of defeating the claim made by said Standard Gas and Electric Company. That the said contention, if true, would serve as a matter of law, to make said Standard liable for all of the debts of the Debtor Corporation. That, for the full protection of the Creditors and Preferred Stockholders of Debtor Corporation, the pleadings of the said Trustee should be amended to permit a determination on the issue of whether Standard Gas and Electric Company is liable for the debts of the Debtor Corporation, which would be in a sum in excess of $10,000,000.00, in addition to a determination that the Debtor Corporation is not indebted to Standard in any amount whatsoever."

38.

On June 4, 1935, the Trustee filed his "Reply to petition of John M. and William H. Taylor, Preferred Stockholders for order directing the Trustee to amend his amended objections to Standard's claim." (R. Vol. 1, p. 231) In this reply the Trustee states that the introduction of evidence before the Special Master was completed on February 13, 1935, at Tulsa; further states

> "* * * that Jack Shinners of Chicago, Illinois, a member of the Deep Rock Reorganization Committee, was in Tulsa on the 13th and 14th of February, 1935, and after the taking of testimony before the Special Master was closed approached the Trustee's counsel with a suggestion that the controversy between the Trustee and the Standard Gas and Electric Company

over the Standard's aforesaid claims should be compromised or adjusted upon some basis; that some discussion of the basis for compromise was had between Mr. Shinners and the Trustee's counsel, which resulted in nothing even tentative; that thereupon, Geo. S. Ramsey, one of the Trustee's counsel, began the preparation of the Trustee's amended objections to the Standard's claim, having previously notified Standard's counsel that upon the introduction of all the evidence the Trustee would file amended objections to the Standard's claim; that in the Trustee's amended objections as then prepared by Geo. S. Ramsey, the following averments and denials appeared, to-wit: * * *

"* * * and your trustee avers that this court should disregard the separate corporate entity of the Deep Rock and the Standard and hold and adjudge the Deep Rock to be a department of the Standard, and that the amount of Standard's claim (whatever it may be) should be adjudged a part of Standard's investment in its own business with the same effect as if it had invested it in its own name, and that on account of the matters herein alleged the Standard's claim in its entirety should be disallowed and not permitted as an indebtedness to participate in the Deep Rock's assets, which should all be utilized for the payment of the Deep Rock's $10,000,000.00 March 1, 1928 notes and the claims of other creditors, and if the assets of the Deep Rock with those properties also standing in the name of the Refining Company (which belong to the Deep Rock) be insufficient to pay the $10,000,000.00 March 1, 1928 notes and the other Deep Rock creditors, *then your trustee should have a judgment against the Standard* for a sum of money sufficient to satisfy the claims of the $10,000,000.00 note holders, and all other creditors of Deep Rock. * * *

"The trustee states that a Master has already been appointed and that the evidence has been taken in support of and in opposition to Standard's claim, and the trustee prays that the court find and adjudge that the Deep Rock was a department of the Standard, and that

Standard's entire account be disallowed and the Standard adjudged liable for the payment of the $10,000,000.00 Deep Rock notes dated March 1, 1928, with interest; that if the court finds the Deep Rock was not a department of the Standard, then all those items in Standard's claim herein objected to by the trustee be disallowed and eliminated from Standard's claim and subordinated to the first and prior lien of the Deep Rock's other creditors on the Deep Rock's assets, and that the court find and adjudge that all the properties of the Refining Company are properties of the Deep Rock and liable for the Deep Rock's debts.

"The trustee prays for all such other and further relief as he may be entitled to under the pleadings and under the evidence." (Tr. Vol. 1, pp. 231 to 234)

Fortunately we preserved these pages in the manuscript copy of the original draft of the Trustee's amended objections which were altered so as to eliminate a counter-claim against the Standard for $10,000,000.00, and will be found as Exhibits A, A-1, A-2 and A-3 to the Trustee's reply. (R. Vol. 1 pp. 231 to 238) In this reply the Trustee also states (R. Vol. 1, pp. 234-235):

"* * * that N. A. Gibson, counsel for the Standard, forwarded to the Standard's Chicago counsel a copy of the proposed amended objections of the Trustee and was directed by the Standard's Chicago officials or Chicago counsel to submit to the Trustee's counsel a proposed compromise agreement, shown by Exhibit C hereto attached, with the understanding that the Trustee's amended objections *would be modified before filing* so as to eliminate therefrom the allegation that Standard was liable for all the debts of the Deep Rock, including the $10,000,000.00 March 1, 1928 notes, and the prayer for judgment against the Standard for a sum sufficient to pay all the debts of the Deep Rock not satisfied out of the Deep Rock's assets and the assets of the Deep Rock Oil and Refining Company. The Trustee states that this modification of the proposed *amended objec-*

tions to the Standard's claim was demanded by the Standard for the reason that such a claim would impair the credit of the Standard and hinder it in refinancing its own affairs, then contemplated and in process by the Standard; the modification of the amended objections was agreed to as a part of the compromise agreement with Standard, subject to the Trustee's right to again amend his objections and allege the Standard's liability for all the Deep Rock's debts and pray for judgment for the same in the event the court refused to approve the proposed compromise between the Standard and the Trustee. The Trustee states that in the event the compromise agreement is disapproved by the court he will ask leave of the court to amend his amended objections so as to restore thereto the allegations and prayer as set forth in Exhibits A, A-1, A-2 and A-3, hereto attached.

"The Trustee denies that the Deep Rock Oil and Refining Company is an indispensable or even necessary party to this proceeding, and as authority therefor relies upon the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *The Texas Company* v. *Central Fuel Oil Company*, 194 Fed. 1."

If the case was going to be compromised no good could be accomplished by damaging the Standard's credit by court action against it for over $10,000,000.00. The publicity following such a cross-action would damage Standard's credit. Of course the Trustee's cross-action against the Standard for over $10,000,000.00 might have some nuisance value to dissenting stockholders, but the elimination of the cross-action for that amount against the Standard was one of the conditions of the Standard's proposed compromise.

39.

On August 12, 1935, the Court entered an order setting for hearing on September 16, 1935, Standard's claim, and ordered "that the Trusteee herein be given to August 19, 1935, to file a list of note holders" and ordered that inter-

veners, Taylors, "be given one week thereafter to mail letters to noteholders." (R. Vol. 1, p. 242)

40.

On August 12, 1935, the Court entered an order setting September 23, 1935, for hearing on the proposed compromise of Standard's claim on the report of the Special Master recommending the approval of the compromise. (R. Vol. 1, p. 242) This order also permitted the Taylors to have printed a sufficient number of circular letters addressed to the stockholders and noteholders of Deep Rock, etc. (R. Vol. 1, p. 243)

41.

The report of the Special Master recommending the approval of the first compromise and the Taylors' objections thereto came on for hearing on September 23, 1935. (R. Vol. 2, p. 400) Counsel for the Taylors read a few of the letters written to his Committee complaining of Standard's mismanagement of Deep Rock and then made an argument in opposition to the approval of the proposed compromise and in opposition to the allowance of Standard's claim in any amount. After counsel for the Tayors had made their argument, counsel for the Standard made a statement, at the close of which the Court said (R. Vol. 2, p. 402), "Now, Mr. Ramsey, can you give me any light on the case?" to which Mr. Ramsey thereupon replied, "I believe I said before, *and I think I can speak for my associate counsel, we don't care whether the court approves it or not. We have submitted it to the court, it involves a large sum of money, as the trustee says in his statement, and I want Your Honor to read that statement.*"

Ramsey testified before the Special Master on March 25, 1935, in regard to the original plan that he did not think it was fair. He testified (R. Vol. 2, p. 393):

"I am not familiar with the plan of *reorganization*

(first plan) that has been proposed by the Committee. I read the first draft of a plan and had some objections to it. I have not read the last draft sent out to security holders—don't know what it is, not going to read it, *because in my opinion the trustee has nothing to do with it.*"

Ramsey further testified before the Special Master (R. Vol. 2, p. 394):

"I examined the first draft of the proposed reorganization plan. I am very frank to say if I were a note holder I would not agree to it. It defers the notes for fifteen years; they don't have to pay the interest for five or six years, control that company. and they have fifteen years without paying interest on the note.

Q. (By Mr. Martin:) That is your opinion?

A. That is my opinion. I don't care what the note holder does, when the trustee gets through they have their own case to look after. I don't own any notes.

Q. Mr. Ramsey, in that respect you are expressing your personal opinion?

A. Oh, I am not expressing the trustee's opinion. never talked to him about it in my life, don't expect to. *My advice to him is that he has nothing to do with it.*"

(NOTE: Also, I did not like the first Re-organization Plan because it provided for the issuance of preferred stock. If I possessed law making power I would deny corporations authority to issue preferred stock or any other classified stock issues—one grade of voting stock for all.)

42.

The order of the Court of September 23, 1935, rejecting the proposed compromise of the Standard's claim was *not res adjudicata,* as argued by Petitioners' counsel. The Court did not adjudicate Standard's claim as valid or invalid. Standard's claim on its merits was not before the Court. The question before the Court was whether or not the Court would accept the Master's recommendations that the claim

be compromised on the basis proposed. The order of the Court entered September 23, 1935, recites that the cause came on for hearing on the "exception and objections of Wililam H. Taylor and John M. Taylor, joined by the holders of 3633 shares of preferred stock who filed their objections to the *report of the Special Master* recommending the approval of the compromise," etc., and

"* * * after the consideration of the Master's report, the objections filed thereto, the record, and argument of counsel, the court finds:

"That the objections heretofore filed herein to the *Master's Report (not the Standard's claim)* by William H. Taylor and John M. Taylor should be sustained and the Master's *recommendations should be rejected and the proposed compromise disapproved.*

"It is therefore, ordered, adjudged and considered by the court that the said compromise agreement entered into between the Trustee and the Standard Gas and Electric Company, be, and the same is hereby disapproved." (R. Vol. 1, pp. 244-245)

(NOTE: The italicized words in the parentheses, "not the Standard's claim," are not in the court order but inserted by me to make clear the Standard's claim was not adjudicated.)

43.

Four days later, and on September 27, 1935, the Standard went into Bankruptcy in the Delaware Federal Court under Section 77-B. (R. Vol. 1, p. 297)

44.

On February 17, 1936, the Court ordered "that the Reorganization Committee of the Debtor, Deep Rock Oil Corporation, submit to this Court within forty-five (45) days from this date (unless time is extended by order of this Court) an amended plan for the reorganization of the Debtor *along with, and as a basis thereof, a new offer* by the Stand-

ard Gas and Electric Company under the authority of th United States Court for the District of the State of Dela ware *for the compromise and settlement of all its claim against the Debtor, to be considered by this Court along wit the amended plan of reorganization,* upon notice to stock holders and creditors to be given as required by Section 77-B of the National Bankruptcy Act." (R. Vol. 1, p. 246) Tha was a wise and business-like order.

45.

On February 17, 1936, N. A. Gibson and Geo. S. Ramse filed and presented to the court a report on the Second Offe of Compromise and Deep Rock's Amended Reorganizatio Plan. (R. Vol. 1, p. 247) The Court had prior thereto in formally appointed Gibson, Ramsey and Milsten a commit tee to examine and report their views on the amended re organization plan "to be submitted tentatively by the Dee Rock's Reorganization Committee, *coupled with* a suggest ed compromise of the claim of the Standard Gas and Elec tric Company against the Deep Rock Oil Corporation." The Committee had a conference on February 5, 1936, an Gibson and Ramsey (Milsten, attorney for the Taylors, ob jecting) said in their report (R. Vol. 1, p. 248):

> "The proposed amended plan speaks for itself an as it will be necessary for the court, when it is sub mitted, to carefully examine and analyze the propose amended plan, we deem it unnecessary to set out a analysis or any argument in support of the amende plan. The undersigned have carefully examined the pro posed amended plan and *we are of the opinion that it the best solution of the Deep Rock's present corporat and financial situation and we therefore recommend t the court that an order be entered directing the Reo ganization Committee to obtain from the Standard Ga and Electric Company, with the approval of the Unite States Court for the District of Delaware, its, Stand ard's, written offer of a compromise of all its claim

against the Deep Rock Oil Corporation, as suggested in the amended plan, and that said Committee, within forty-five (45) days, report said amended plan and proposed compromise to this court for a hearing thereon as provided by Section 77-b of the National Bankruptcy Act."

46.

On March 31, 1936, the court, on petition of the Reorganization Committee, extended the time for the presentation of the Amended Plan, with directions that the Committee present the Amended Plan within 60 days from and after the expiration of the time heretofore allowed. (R. Vol. 1, p. 255) This order of extension was occasioned by the necessity of filing an application in the Delaware Federal Court for an order authorizing the Standard to accept the amended plan, coupled with a proposed compromise of its claim against the Deep Rock.

47.

On November 9, 1936, the Standard filed its petition reciting that it had gone into 77-b Bankruptcy in the Delaware Federal Court on September 27, 1935, and stated that the Delaware Federal Court, on November 2, 1936, had entered an order authorizing the Standard to submit another offer of compromise and settlement of its claim against the Deep Rock as *a part of the proposed Amended Plan of Reorganization,* and prayed that the Court enter an order approving and permitting the filing of the offer and proposal by Standard of a compromise and settlement of its claim against the Deep Rock, "*conditioned,* among other things, upon the final confirmation by this Court of a Plan of Reorganization acceptable to Standard," on or before February 8, 1937. (R. Vol. 1, pp. 296-298)

48.

On the same day, November 9, 1936, the court entered an order granting the Standard leave to file its written

offer to compromise its claim "heretofore filed herein in the amount of $9,342,642.37 *upon the conditions and subject to the terms of said written proposal of compromise,*" and set December 12, 1936, as the date for considering the approval of the compromise and the Amended Plan. (R. Vol. 1, p. 299)

49.

On December 17, 1936, the court entered an order approving the action of the Debtor in filing the Amended Plan, etc. (R. Vol. 1, p. 356)

50.

On December 22, 1936, the court entered an order permitting the intervention of John M. Taylor, Oscar A. Kennedy and T. E. Webster as Independent Committee for the Protection of the Holders of Preferred Stock of the Deep Rock. (R. Vol. 1, p. 357)

51.

On February 3, 1937, the Standard filed its acceptance of "Amended Plan of Reorganization, as Modified, of Deep Rock Oil Corporation." (R. Vol. 1, p. 425) This acceptance of the Amended Plan, as modified, was by the authority of the order of the Delaware Federal Court made on January 27, 1937. (R. Vol. 1, p. 426)

52.

Final Decree. On February 3, 1937, the Court entered its final decree approving the amended plan as modified and the Standard's offer of compromise. (R. Vol. 1, p. 428) That is the order and decree now under review by this Court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OKLAHOMA.

In Bankruptcy No. 2318,
Consolidated.

IN THE MATTER OF THE DEEP ROCK OIL CORPORATION, A CORPORATION, DEBTOR.

TRUSTEE'S ABSTRACT OF THE EVIDENCE, ANALYSIS OF STANDARD'S CLAIM, AND BRIEF IN SUPPORT OF HIS OBJECTIONS TO STANDARD'S CLAIM.

GEO. S. RAMSEY,
VILLARD MARTIN,
GARRETT LOGAN,
Counsel for Trustee.

BEFORE HONORABLE PRESTON C. WEST, SPECIAL MASTER.

As this reference involves many questions of law a facts arising on an accounting between the Standard G and Electric Company, and Shaffer Oil and Refining Co pany, now Deep Rock Oil Corporation, over a period fr the early summer of 1919 to March 1, 1933, the followi tabulation of important data, about which there is no d pute, will be helpful in solving the questions:

Abbreviated Names.

Throughout this abstract and brief we will refer to t corporations involved as follows:

(a) Standard—for Standard Gas and Electric Co pany.

(b) Deep Rock—for Shaffer Oil and Refining Compa (name changed to Deep Rock Oil Corporatio

(c) Refining Company—for Deep Rock Oil and Refi ing Company.

(d) Management Corporation—for Byllesby Engine ing and Management Corporation.

(e) Byllesby and Company—for H. M. Byllesby a Company.

(f) "Stipulation in Regard to Claim of Standard G and Electric Company" will be referred herein as "Stipulation."

Preliminary Comment.

There is neither allegation nor proof that the Stan ard's or Deep Rock's officers and directors derived a direct personal profit from any of the transactions here assailed. But their loyalty to the Standard was so excessiv

and pronounced that they were wholly disqualified to act for Deep Rock, whose interest they woefully neglected and perverted to the intentional advantage of Standard to the great injury of the Deep Rock, its creditors and stockholders.

Parent and Subsidiary Corporation Set-Ups.

(1) *H. M. Byllesby & Company,* the top corporation, was organized under the laws of Delaware on January 14, 1904. (Tr. 389) According to the testimony of Mr. John J. O'Brien (Tr. 3), "In the start, it was an engineering and financing concern both. From 1919 on it was simply an *investment banking house.*" According to the testimony of Mr. O'Brien, H. M. Byllesby & Company had stock in the Standard and "was in a sense in control." Upon authority of H. M. Byllesby & Company stockholders of that corporation purchased 1,000,000 shares of the Standard, of the par value of $1.00 per share, in order that it might retain control of the Standard. Of the authorized issue of 1,000,000 shares H. M. Byllesby & Company purchased approximately 997,000 shares "which gave us control." (Tr. 3-4, also 28-29) H. M. Byllesby & Company paid cash for stock which was later retired in June, 1930, and "we got control, or part control in another way" (Tr. 4) and retain joint control with the United States Electric Power Company which owns a majority of Class A stock of the Standard Power & Light Company, "and the Standard Power & Light Company in turn owns the control of the Standard Gas & Electric." H. M. Byllesby & Company owns the majority of Class B stock of the Standard Power & Light Company and that stock, Class B, gives H. M. Byllesby & Company the right "to elect eight of the fifteen directors of the Standard Gas & Electric Company," which gives it virtual control. (Tr. 5; also Tr. 29)

(2) *Standard Gas and Electric Company* was organized under the laws of the State of Delaware on April 28, 1910. Up to 1919 the Standard was largely an investment company, investing in common stocks ordinarily, and sometimes in preferred stocks and bonds of utility companies. From 1919 on it was in the mangement business as well as the ownership of various stocks and bonds. (R. Vol. 2, p. 2) From 1919 on the Standard entered into the management and engineering of public utility properties as well as ownership of stocks and bonds. Standard has not purchased and operated public utilities as the direct owner thereof, and its president, Mr. O'Brien, does not think it owns any physical properties other than office furniture. (R. Vol. 2, p. 8) Standard has charged management fees against subsidiary public utility companies. (Tr. 23-24)

(3) *Byllesby Engineering and Management Corporation* was organized under the laws of the State of Delaware on June 21, 1919. (Tr. 389) The Standard caused this corporation to be organized. (Tr. 24) Its stock consists of 100,000 shares of no par value, now and at all times wholly owned by Standard. (Tr. 5-6-467-55-56) In answer to the request to state the time of its organization "and the purpose of the organization of Byllesby Engineering & Management Company," Mr. O'Brien testified (Tr. 5):

> "Well, the approximate time was in the year 1919. I have forgotten the exact month, but it was in that year. The Standard Gas & Electric Company was struggling along and was not in very good shape. We had just gone through a period where utility costs had been mounting at a great rate during the war, costs of every kind, materials we had purchased, labor and everything else, and we were not getting relief from the Commissions. H. M. Byllesby & Company at that time owned the engineering business. Col. Byllesby started in life as an engineer, one of Edison's associates. We

were doing the engineering and management of these properties, that is, H. M. Byllesby & Company, and in order to help Standard out at that time we turned over the entire engineering and mangement which we owned, without one dollar of payment. That was g i v e n to Standard gratis in order to help it out and give it an earning statement that it could go on with its business."

As said by Mr. O'Brien (Tr. 24) the officers of the Byllesby Engineering and Management Corporation were "practically the same officers as the Standard Gas & Electric—much the same, not altogether." Standard probably had more on its Board. But directors of Byllesby Engineering and Management Corporation were directors of the Standard. *R. J. Graf* testified (Tr. 118):

Q. "Well, the directors of the Byllesby Engineering and Management Corporation were likewise directors of the Standard Gas and Electric Corporation, weren't they?

A. Yes, sir.

Q. And they were selected, that is, the directors and officers of the Byllesby Engineering and Management Corporation were selected or rather elected by the Standard Gas and Electric Company?

A. Yes, sir."

This corporation was organized to assist the utilities companies controlled by the Standard and "any other companies in which" Standard "might be interested." (Tr. 55-56) The Engineering and Management Corporation paid the salary of H. M. Byllesby, as president of the Standard, and likewise paid the salary of Mr. O'Brien, as succeeding president of both of said corporations, and the salaries of the other executive officers of the Standard. The Standard paid no salaries to its executive officers, neither to its vice-presidents nor any other executive officers. (Tr. 26) Nor did Standard pay any of its employees. They, and also the

office rent, were paid by the Engineering and Management Corporation. (Tr. 550, 551, 553) Prior to the organization of Byllesby Engineering and Management Corporation the salaries of H. M. Byllesby and myself were paid by H. M. Byllesby and Company. (Tr. 27) The Engineering and Management Corporation has no properties other than a library and necessary tools of the engineering department —the kind of tools craftsmen use, such as tables, desks, maps and things of that sort, including drawing instruments, blue prints, and that sort of thing. (Tr. 29)

(NOTE: It is worthy of note that B. F. Braheney Vice-President of Byllesby Engineering and Management Corporation, and Standard's General Auditor was wholly unable to state what, if anything, the Standard paid for the 100,000 shares of no par value Byllesby Engineering and Management Corporation stock B. W. Lynch, Standard's Assistant Secretary and Treasurer in 1920 and 1921, and Standard's Vice-President since 1922, was unable to state (Tr. 661, etc.) what price *or value* the Standard paid for the 100,000 shares of the Engineering and Management Corporation stock. He testified that the consideration was some cash and securities, and that the securities were never assigned any ledger value but that the 100,000 shares were carried on the Standard's books at a valuation of $1.00. It should not be presumed worth much under these circumstances as the evidence shows its only property is a library and engineering maps, etc. There can be no doubt under the authorities that the Engineering and Management Corporation was organized and existed as a mere agency and department of the Standard, and that every act of the Engineering and Management Corporation was the act of the Standard and that they will be treated for the purposes of this case as one corporation. *Practically all Standard's business was carried on and transacted by it in the name of and through the Engineering and Management Corporation.* (Tr. 550 to 555. *See Tr. 554 for direct evi*

dence of this and authorities, page .... herein.) Knourek testified (Tr. 554):

Q. "The Standard Gas and Electric Company has been managed at all times since Byllesby Engineering and Management Corporation was organized, that is, the Standard has been managed by the Byllesby Engineering and Management Corporation, isn't that correct?

A. Yes, sir.

Q. And the Byllesby Engineering and Management Corporation pays all the expenses of the Standard? In other words, the Standard does not pay the executive officers any salaries, does not pay its employees any salaries?

A. Standard only pays such expenses as are directly incidental to its particular business of owning and holding securities."

Not only this, but it was operated as a mere conduit through which Standard diverted to itself from public utilities and other corporations owned or controlled by it through stock ownership, moneys of such subsidiary or affiliated corporations. No doubt this was a scheme for maintaining higher public utility rates charged the consumers. By this means the Standard was enabled to disguise large utility profits by furnishing its subsidiaries a basis for sustaining higher rates than otherwise justified. The Engineering and Management fees found their way into the Standard's treasury or inured to Standard's benefit, as it appears the Engineering and Management Corporation paid the salaries of all the Standard's officers and employees as well as its office rent and expenses. (Tr. 553 to 555) Exhibit No. 18 to the "Stipulation" shows that the Engineering and Management Corporation, after paying the salaries of Standard's officers, employees, rent, expenses, etc., and without any tangible or intangible assets of any substantial or appreciable value, accumulated a surplus of $1,509,679.57 and paid dividends to the Standard from 1919 to 1933, inclusive, totaling $23,976,404.10.)

Standard's Annual Report for the year ending December 31, 1923 (Trustee's Exhibit D), page 5, over the signature of H. M. Byllesby, President, "by order of the Board of Directors," states that

> "The Byllesby Engineering and Management Corporation, which is owned by Standard Gas and Electric Company, and performs the engineering and management services for the operated companies, again greatly increased its business. This subsidiary enjoys the highest standing for specialized ability in the administration of *public utility properties*, and is completely organized and equipped for such duties."

Each of the Standard's annual reports for the years 1924 to 1932, inclusive, refer to the Byllesby Engineering and Management Corporation as wholly owned by the Standard.

Standard's Annual Report for the year ending December 31, 1927 (Trustees Exhibit H), page 9, states that

> "Byllesby Engineering and Management Corporation, *whose entire earnings accrue to Standard Gas and Electric Company*, continued to progress and grow at a rate commensurate with the growth and development of the subsidiary and affiliated companies."

Standard's Annual Report for the year ending December 31, 1928 (Trustee's Exhibit I), page 10, states that

> "Byllesby Engineering and Management Corporation, *whose entire earnings accrue to Standard Gas and Electric Company*, continued to show growth consistent with the development of the subsidiary and affiliated companies."

Standard's Annual Report for the year ending December 31, 1929 (Trustee's Exhibit J), page 8, states that

> "Byllesby Engineering and Management Corporation, whose entire net earnings accrue to Standard Gas

and Electric Company, through ownership of all its stock by the latter company, renders engineering and/or management services to all the subsidiary and affiliated companies of Standard Gas and Electric Company."

Standard's Annual Report for the year ending December 31, 1930 (Trustee's Exhibit K), page 9, states that

"Byllesby Engineering and Management Corporation, a wholly-owned subsidiary of Standard Gas and Electric Company, continued to show progress *consistent with the development* of the subsidiary and affiliated companies."

Standard's Annual Report for the year ending December 31, 1931 (Trustee's Exhibit L), page 9, states that

"Byllesby Engineering and Management Corporation, a wholly-owned subsidiary of Standard Gas and Electric Company, cooperated with the subsidiary and affiliated companies of the system in bringing about marked reductions in operating expenses, and continued its record of successful *public utility operation.*"

C. B. Shaffer Sale Contract.

As shown by Claimant's Exhibit 2 (R., Vol. 2, p. 635), C. B. Shaffer and H. M. Byllesby & Company entered into a written contract on May 20, 1919, for the organization of a corporation and the transfer by Shaffer to the corporation of certain properties therein described for the consideration therein mentioned, said written contract being as follows:

"*This agreement* entered into this 20th day of May, 1919, by and between C. B. Shaffer of the City of Chicago, Illinois, party of the first part, and H. M. Byllesby and Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, party of the second part, *witnesseth:*

That for and in consideration of the sum of One Dollar ($1.00) paid to the party of the first part by the party of the second part, the receipt whereof is hereby confessed and acknowledged, it is mutually agreed as follows:

1. Said party of the first part shall cause to be formed a corporation under the laws of the State of Delaware. Said Company shall have five hundred thousand (500,000) authorized shares of common stock without par value, and five hundred thousand (500,000) shares of preferred stock of the par value of One Hundred Dollars ($100) each and an issue of Fifteen Million Dollars ($15,000,000) of First Mortgage Bonds on all the hereinafter mentioned properties to be acquired or additions thereto;

(a) The common stock of without par value shall be sold at One Dollar ($1.00) per share.

(b) The preferred stock to be non-voting; seven per cent accumulative from date of issue with further provision that after the common stock has received seven per cent in any year, both preferred and common stock shall share the same rate of dividends for that year up to ten per cent; after ten per cent has been paid on both preferred and common stock in any year, the preferred stock shall be entitled to one-fourth of one per cent of every additional one per cent paid on the common stock in any given year.

(c) The bonds are to be a ten-year first mortgage bond bearing interest at the rate of six per cent per annum, with an annual sinking fund graduated so as to amortize the bonds in ten years from date thereof in proportionate amounts.

2. The said party of the second part shall purchase from the Company to be formed Eleven Million Dollars ($11,000,000) par value of bonds and Five Million Dollars ($5,000,000) par value of preferred stock and one hundred twenty thousand (120,000) shares of the common stock of the Company to be formed and pay there-

for Fifteen Million Two Hundred Thousand Dollars ($15,200,000) in cash, such cash to be applied to payment of cash consideration to the property hereinafter described as C. B. Shaffer No. 2, and the purchase of the physical property of the Consumers Refining Company and provide cash for the Treasury.

3. The said party of the first part shall convey to the company to be formed the following property, to-wit:

(a) All and singular the oil and gas leases owned and held by what is known as C. B. Shaffer No. 2, developed and undeveloped in the State of Oklahoma and not to exceed ten thousand (10,000) acres in the State of Texas, including the derricks, casing, piping, tools, water lines, pipe lines, pumping stations, pipe and supplies; twenty-three (23)—fifty-five thousand barrels (55,000) capacity oil storage tanks on the Read and Williams tank farms, field tanks, engines, boilers, machinery and appliances, whether the same are attached in operation, in storage or reserved for operation, except the following leases in Oklahoma now in litigation:

> The Southeast Quarter of Southwest Quarter, Section Three (3), Township Seventeen (17), Range Seven (7) East, and also Southwest Quarter of Northeast Quarter, Section Thirty-three (33), Township Seventeen (17), Range Seven (7) East,

that remain the property of C. B. Shaffer, but including all physical property used and held in the business of C. B. Shaffer No. 2 in development and production of oil and gas on the leases aforesaid, subject to foregoing exceptions.

(b) All the leases of the Theta Oil Company for oil and gas purposes in the State of Kansas, drilled and undrilled, including the equipment of wells operated, or in process of drilling, including all equipment and personal property used or useful in connection with the operation of said Company or on said leases designed for that purpose.

(c) The physical and real property of the Consumers Refining Company, inclusive of its stock held in the Home Oil Company, the real estate held in fee simple, together with the improvements thereon, consisting of stills, buildings, tanks and complete plant with appurtenances as operating at this date, tank cars owned, iron barrels, furniture and fixtures, certain merchandise and supplies on hand and personal property used or useful to the operation of the refinery and now on the premises. Further, the Company to be formed to take over so much only of the accounts receivable of the Consumers Refining Company that are due to it from the Home Oil Company and Distributing Department of the Consumers Refining Company and no other book assets. The Company to be formed to assume and pay all notes payable by the Consumers Refining Company to the Paragon Oil Company of approximately Forty-nine Thousand Dollars ($49,000.00), and also all liabilities of the distributing Department of the Consumers Refining Company, the last named Company agreeing to pay and discharge all its liabilities otherwise existing and incurred prior to January 1, 1919.

3. The leases hereinbefore referred to, to be separately listed in substantial detail for identification. The leases acquired to be strictly limited to such as may be set forth in such list. It being understood, however, that the leases have been taken on usual printed forms in the several states where situate, and under which operations have been carried on, and the party of the first part does not warrant or guarantee the same in any manner whatever, but assigns or conveys only such title thereto as he possesses, and is relieved of any liability therefor.

It is understood that the leases are confined to such as are in force at the date of actual transfer hereafter, and not as existed January 1, 1919, some then and since held having been surrendered and others taken since that date.

4. In consideration for said property, the Com-

pany to be formed shall pay therefor the net sum of Fifteen Million Five Hundred Eighty Thousand Dollars ($15,580,000) in the manner following:

(a) C. B. Shaffer No. 2, Cash.....	$ 7,000,000
Note of H. M. Byllesby and Company and Standard Gas and Electric Company, or both, for four months with interest at 6%.....	1,000,000
Said note shall be secured by 10,000 shares par value of the preferred stock of the Company, to be issued in the name of C. B. Shaffer and endorsed by him as collateral for the payment of such note.	
44,000 shares of preferred stock, 7% Cumulative Dividends, par value $100.00 of the Company to be formed.....	4,400,000
80,000 shares common stock without par value of the Company to be formed, rated at $1.00 per share.....	80,000
(b) Theta Oil Company:	
6,000 shares preferred stock of Company to be formed.....	600,000
(c) Consumers Refining Company:	
Cash to purchase physical property from respective holders thereof.....	2,500,000
	$15,580,000

(d) The Company to be formed shall pay to the owners in C. B. Shaffer No. 2, all United States Internal Revenue Tax whatsoever that may be assessed by the Government for the calendar year 1919 arising from the profits of the sale of the C. B. Shaffer No. 2 property to the Company to be formed, and in addition such increase of the surtax as provided in Article 13 of Regulation 45 promulgated by the Internal Revenue Department, which said owners on C. B. Shaffer No. 2

property may be assessed on an amount not to exceed Two Hundred Thousand Dollars ($200,000) for each of said owners for other income than that derived from the profits of the sale of C. B. Shaffer No. 2 property because of such sale and profits derived therefrom. It being the intention that there shall be paid by the Company in addition to the tax upon the profits derived from such sale, only the difference between the surtax that would be payable by the owners on an amount of income not to exceed Two Hundred Thousand Dollars ($200,000) each, if no sale had been made of profits derived, and the increased surtax on said Two Hundred Thousand Dollars ($200,000) for each of said owners resulting because of profits derived by such owners from such sale. To provide for payment of such taxes, there shall be reserved and set aside by the Company to be formed and held within its treasury the sum of Three Million Dollars ($3,000,000), the same and no part of which shall be used for any other purpose until such taxes have been fully paid.

5. The Company to be formed shall pay to the said party of the first part, cash and deliver the note and stocks hereinbefore mentioned upon delivery to it of all necessary and proper deeds, assignments to pass title and possession of said properties to it, said cash, stocks and note shall be delivered simultaneously with said deeds and assignments. All to be done on or before July 1, 1919, and in the event of delay because of matters beyond control of party of second part an extension of not more than fifteen days will be given.

6. The Company to be formed shall perform the obligations of all contracts existing January 1, 1919, having reference to purchase or sale of gas, casinghead gas, crude or refined oil, gasoline or by-products as between C. B. Shaffer and Consumers Refining Company and any outside corporations or individuals. All such contracts are set forth in the schedule hereto attached and made a part hereof.

7. The transfer of all the properties hereinbefore

mentioned to the Company to be formed shall relate to and become effective as of January 1, 1919. The said Company to be formed shall receive the profits of the said properties and business from January 1, 1919, until it actually takes over and pays for the properties as herein provided; assuming all liabilities, accrued since said date, and until transfer is accomplished as above set forth, the Company to be formed shall pay to the owners of the properties consolidated, interest in cash at the rate of six per cent per annum upon the principal sum of Fifteen Million, Five Hundred Thousand Dollars ($15,500,000) from January 1, 1919, to the date of transfer.

8. That the said party of the first part shall procure from the Barbara Oil Company a contract with the Company to be formed to sell its entire production of crude oil to the Company to be formed at the rate per barrel equal to the price others may be willing to pay for the same, such contract to cease at any time the Barbara Oil Company may sell its property.

9. That H. M. Byllesby, Arthur S. Huey, Otto E. Osthoff, and J. J. O'Brien respectively, are to continue in active service of the Company to be formed, devoting their time and attention to its best interests for such time as C. B. Shaffer shall remain with the Company, as provided in the next succeeding paragraph; that the present organization of the business of C. B. Shaffer No. 2, the Consumers Refining Company and the Theta Oil Company, as may be mutually determined, shall be retained as a department of the Company to be formed; *that C. B. Shaffer shall become a director and member of the Executive Committee and be President of the Company to be formed in charge of the oil and gas interests in all their details. It is further agreed that the number of directors of the Company to be formed shall be ten (10), of which C. B. Shaffer shall nominate five (5). H. M. Byllesby is to be elected a director and chairman of the Board of Directors of the Company to be formed.*

10. The party of the first part shall assume t
defense of all suits now pending or which may
brought for any cause of action existing prior to or
January 1, 1919, and shall pay all judgments that m
be recovered in such suits to the extent of recoveri
for liability prior to that date and the Company to
formed shall pay for liability incurred after that da

11. The said parties hereto agree to form a voti
trust of all the common stock issued to them by the co
poration to be formed, which trust shall exist for a p
riod of *ten (10) years.* The said parties agree to deliv
or cause to be issued to the trustees certificates of t
capital stock of the Company to be formed, to whi
they are entitled, such certificates to be duly assigned
said trustees accompanied by powers of attorney pro
erly executed, permitting the transfer into the nam
of the trustee on the books of the Company to be form
of the shares of common stock respectively owned
them and represented by such certificates. *Each of t
parties hereto shall name two trustees.* The certificat
issued by the trustees to the parties hereto for su
common stock shall be in negotiable form.

In witness whereof, the said party of the first pa
has hereunto set his hand and seal and the said par
of the second part has caused these presents to be ex
cuted in its name by its President and Secretary and
corporate seal thereto affixed, the day and year fi
above mentioned.

(Signed) C. B. Shaffer. (Seal)
H. M. Byllesby and Company
(Corporate Seal) By (Signed) H. M. Byllesby,
Attest: Preside
(Signed) R. J. Graf, Secretary."

Under the 4th paragraph of the above contract it w
agreed that the new Company "to be formed shall p
therefor the net sum of $15,580,000" (new Company aft
wards formed on May 31, 1919, under the name of Shaf

Oil and Refining Company—now Deep Rock Oil Corporation) "in the manner following:"

(a) C. B. Shaffer, cash for oil properties...	$ 7,000,000
Note of H. M. Byllesby and Company and Standard Gas and Electric Company, or both, due in 4 months at 6% interest	1,000,000
(NOTE: This $1,000,000 note was to be secured by 10,000 shares par value of the preferred stock of the new Company.)	
44,000 shares of preferred stock, 7%, Cumulative dividends, par value $100 "of the Company to be formed"....	4,400,000
80,000 shares of common stock without par value "of the Company to be formed," rated at $1.00 per share.....	80,000
(b) Theta Oil Company	
6,000 shares preferred stock "of Company to be formed".....	600,000
(c) Consumers Refining Company (for purchase of refinery then in the name of Consumers Refining Company)	
Cash.....	2,500,000
Total	$15,580,000

That was what Shaffer was to get and what he got. *He got nothing from H. M. Byllesby & Company or Standard Gas and Electric Company.* The new Company was to, and did get, the following:

(a) All the Shaffer leases carried by him as C. B. Shaffer No. 2, developed and undeveloped, lying in the State of Oklahoma, plus leases in Texas not exceeding 10,000 acres; also including derricks, casing, piping, tools, water lines, pipe lines, pumping stations, pipe and supplies; also 23-55,-

000-barrel storage tanks, including field tanks, engines, boi ers, machinery, appliances, etc.

(b) All the property of the Theta Oil Company, whic had developed and undeveloped leases in the State of Ka sas.

(c) The refinery then standing in the name of the Co sumers Refining Company.

(4) *Deep Rock Oil Corporation* was organized und the name of *Shaffer Oil and Refining Company* under t laws of the State of Delaware on May 31, 1919 (see Tru tee's Exhibit Z, R., Vol. 2, p. 629) with authority to do a most everything, including acquisition and development oil and gas leases, ownership and operation of gas and w ter pipelines, manufacturing, processing, refining, distri uting and transporting petroleum and other oils, natur and artificial, including authority to buy and sell crude a refined mineral oils and to manufacture and refine, or othe wise treat the same for the supply of the general mark etc. It also has authority under its Articles of Incorpor tion "to purchase, subscribe for or otherwise acquire, a to hold, sell, transfer and otherwise dispose of stocks, bond mortgages, notes and other evidences of indebtedness any person, persons or corporations, and to issue, execu and deliver in exchange therefor its stocks, bonds, mor gages, notes and other obligations, and, while the owner any stock, to be empowered to exercise all rights and pri ileges of ownership thereof, including the right to vo thereon." Also "to acquire, hold, use, sell, assign, leas grant licenses in respect of, mortgage or otherwise dispo of letters patent of the United States or any foreign cou try, patents, patent rights, licenses and privileges," et including trade-marks, trade names, etc.; also to iss bonds, debentures or obligations from time to time, and secure the same by mortgage, pledge, deed of trust or othe

wise; also to make, accept, endorse, discount, execute and issue promissory notes, bills of exchange and other negotiable instruments. Its authorized capital stock was 1,000,000 shares, divided into 500,000 shares of common stock without any nominal or par value, and 500,000 shares of preferred stock of the value of $100.00 per share. The preferred stock carried cumulative dividends at the rate of, but not exceeding (except on certain conditions not important) 7 per cent per annum payable in equal quarterly installments as may be determined by the Board of Directors. The Articles of Incorporation also provided that

> "Said preferred stock shall have *no voting power on any question,* but should said dividend upon said preferred stock be not paid or paid at a rate less than 7% per annum and remain so unpaid or at a rate of less than 7% per annum for a period of 6 months, then and so long as no dividend is paid on said preferred stock or a dividend is paid at a rate of less than 7 per cent per annum, the said preferred stock, in respect of which no dividend is paid or a dividend is paid at a rate of less than 7% per annum shall be entitled to the same voting powers thereon as belong to the common stock, but upon the resumption of the payment of dividends at the rate of 7% per annum the voting power upon such stock shall again cease."

This non-voting power of the preferred stock continued throughout all the amendments to the Articles of Incorporation, with the qualifications above mentioned. The original subscribers for the capital stock subscribed for only 10 shares. In accordance with the laws of Delaware the Articles of Incorporation authorized the Board of Directors to appoint an Executive Committee, which is empowered to exercise all the authority possessed by the Board of Directors, as defined by the By-Laws, except as otherwise required by the Delaware statutes.

On June 6, 1921, the Articles of Incorporation were amended (see Trustee's Exhibit Z-1) by changing the authorized capital stock from 1,000,000 shares, divided into 500,000 shares of common stock without par value and 500,000 shares of preferred stock of $100.00 par value per share, to 1,000,000 shares divided into 460,000 shares of common stock without par value, 40,000 shares of Class A common stock of $1.00 par value per share, and 500,000 shares of preferred stock of $100.00 per share, the preferred and Class A common stock to have the status set forth in the amendment.

On June 7, 1921, the Articles of Incorporation were again amended (see Trustee's Exhibit Z-2) so as to provide for a reduction of the capital stock by the surrender of 50,000 shares of preferred stock and 80,000 shares of common stock in exchange for 40,000 shares of Class A common stock of the par value of $1.00 per share.

On April 12, 1928, the Articles of Incorporation were further amended (see Trustee's Exhibit Z-3) so as to authorize the issuance of 1,450,000 shares in lieu of the preferred and common stock outstanding or previously authorized, all to be of no par value, consisting of 450,000 shares of preferred and 1,000,000 shares of common. The amended articles also provided that the 140,000 shares of preferred stock of $100.00 par value theretofore issued pursuant to the Articles of Incorporation as previously amended and outstanding, shall remain as outstanding preferred stock without par value, of a series designated "*Convertible Preferred Stock,* $7.00 Cumulative," with the rights and provisions set forth in Article Fourth, and certificates for said convertible preferred stock shall be issued in place of and upon surrender of the certificates for the $100.00 par value preferred stock outstanding, etc. The maximum dividend rate on the Convertible Preferred stock, $7.00 Cu-

mulative, shall be $7.00 per share per annum and the maximum dividend rate of each other series should not exceed $7.00 per annum per share, as may be fixed by the Board of Directors. The holders of the preferred stock of no par value under this amendment of April 12, 1928, "shall have no voting power other than that specifically provided by law, except that if, when and so long as at any time the stock of such series shall be in default in respect of the cumulative dividends fixed for such series to an amount which, computed to the end of the last preceding quarterly dividend period, shall exceed a sum equal to one-half of the annual cumulative dividend rate, each share of preferred stock of such series shall be entitled to one vote." The holders of common stock shall be entitled to one vote for each share of common stock standing in their respective names.

By amendment effective March 31st, 1931 (see Trustee's Exhibit Z-4, R., Vol. 2, p. 631), the name of Shaffer Oil and Refining Company was changed to Deep Rock Oil Corporation.

Its Directors' meetings were held in Chicago in Mr. O'Brien's office occupied by him as President of Standard (Tr. 51, 117, 171) and its minute books of Directors' meetings were kept in Chicago. (Tr. 186) The original minutes of Stockholders' meetings were kept in Chicago (Tr. 643-644) *in the Chicago offices of the Deep Rock Oil and Refining Company.* (Tr. 644) The Standard received not only monthly but daily reports from Deep Rock. (Tr. 312)

Deep Rock's Capital Structure.

Mr. O'Brien testified (Tr. 40) that the contract between H. M. Byllesby and Company and C. B. Shaffer, of May 20, 1919, (Claimant's Exhibit 2) was carried out as executed by the parties.

Thus we find the Deep Rock Oil Corporation was orga-

nized under the name of Shaffer Oil and Refining Company on May 31, 1919, with an authorized capital stock of 1,000,000 shares divided into 500,000 shares of no-par value common stock and 500,000 shares of $100.00 par value preferred stock. Under the contract of May 20, 1919, between Shaffer and H. M. Byllesby and Company, H. M. Byllesby and Company subscribed for

Preferred stock—50,000 shares	$ 5,000,000
C. B. Shaffer subscribed for	
Preferred stock—44,000 shares.....	4,400,000
Shaffer also received for the Theta Oil Company properties	
Preferred stock—6,000 shares	600,000
This, at par value, totals.....	$10,000,000
H. M. Byllesby and Company subscribed for	
Common stock, $1.00 par value, 120,000 shares	$ 120,000
C. B. Shaffer subscribed for	
Common stock, $1.00 par value, 80,000 shares.	80,000
Ths totaled for common stock.....	$ 200,000
This made a total money capitalization of.....	$10,200,000

Shaffer paid for his preferred and common stock by transferring property, and in addition thereto transferred the refinery standing in the name of the Consumers Refining Company at a valuation of $2,500,000.00. Under the contract with Shaffer it was necessary for the new company to have $10,500,000.00 in order to pay Shaffer $7,000,000.00 in cash, the Standard's $1,000,000.00 note, and the $2,500,000.00 for the Consumers Refining Company. Shaffer put in no money. H. M. Byllesby & Company, under the contract, was obligated to pay for its preferred and common stock $5,120,000.00, which was wholly inadequate

to pay Shaffer $10,500,000.00 required by the contract—short $5,380,000.00. The contract with Shaffer provided that the new corporation should be authorized to issue $15,000,000.00 of first mortgage bonds on all of the properties acquired from Shaffer.

Mr. Lynch testified that $12,000,000.00 of these first mortgage bonds were issued and sold, and that $3,000,000.00 unissued bonds were pledged to secure a note issue of $2,000,000.00. Lynch testified that the $12,000,000.00 of these bonds were sold at one time and that the $3,000,000.00 unissued bonds were later pledged, as above stated. (Tr. 304) These $12,000,000.00 of first mortgage bonds were underwritten by a syndicate formed by H. M. Byllesby & Company and were sold to the public. (Tr. 42 and 636)

$7,000,000.00 of the proceeds of the sale of the $12,000,000.00 first mortgage bonds were used to pay Shaffer the $7,000,000.00 in cash called for by the May 20, 1919, contract, according to the best recollection of Mr. J. J. O'Brien, who ought to know. (Tr. 43-44)

Thus instead of the Standard or H. M. Byllesby & Company subscribing for a sufficient amount of preferred or common stock to raise $10,500,000.00 cash requirements for the acquisition of the property, it left the new company short $5,380,000.00 of enough funds to pay the purchase price of the Shaffer properties. Little wonder the Deep Rock began its career encumbered with a large first mortgage bond issue. Necessarily it had to have funds to operate and evidently at least $5,380,000.00 of the proceeds of the first mortgage bond issue were used in paying for the assets of the corporation. Therefore, instead of having a capitalization equivalent to the valuation of the properties purchased from Shaffer, it began its existence with a capital deficiency of $5,380,000.00, which was represented by the Deep Rock's 6% first mortgage bonds, constituting a first

lien on all of its assets. *Thus by common stock ownership the Standard was master of the Deep Rock without the necessity of owning it.* Common stock of the new corporation to be organized under the contract of May 20, 1919, would have the voting power, and as H. M. Byllesby & Company subscribed for 120,000 shares and Shaffer for only 80,000 shares, Byllesby & Company, or the Standard, which appears to have taken the stock, would have control of the new company. Shaffer evidently had no intention of submitting to Standard or Byllesby control. Thus section 9 of the contract of May 20, 1919, provides that "H. M. Byllesby, Arthur S. Huey, Otto E. Osthoff, and J. J. O'Brien, respectively, are to continue in active service of the Company to be formed," and "C. B. Shaffer shall become a director and member of the Executive Committee and be President of the Company to be formed in charge of the oil and gas interests in all their details." It was further agreed in Section 9 that the Board of Directors of the Company to be formed shall be ten, "of which C. B. Shaffer shall nominate five," and H. M. Byllesby is to be elected a director and chairman of the Board of Directors of the Company to be formed. Of course this meant that Standard or Byllesby, controlling the majority of the voting power, would elect the other five directors, which they did. Section 11 of the contract obligated the parties "to form a voting trust of all the common stock issued to them by the corporation to be formed, which trust shall exist for a period of *ten years*," and provided for the appointment of trustees to whom the common stock should be assigned, with voting power, each of the parties, that is Shaffer and H. M. Byllesby & Company, to appoint two trustees. Of course this might result in a deadlock. At any rate it is apparent that the Standard wanted to get rid of Shaffer and obtain absolute control of the Deep Rock and thus in March, 1921, or shortly thereafter, Shaffer surrendered his

50,000 shares of preferred stock, composed of 44,000 issued to him as part consideration for the properties conveyed and 6,000 issued to him as consideration for the Theta Oil Company properties, and also his 80,000 shares of common stock, plus $200,000.00 par value of the first mortgage bonds of the Deep Rock, in part consideration for which Shaffer was to receive $10,000.00 in cash, $500,000.00 six months' note, and $240,000.00 twelve months' note, and certain other considerations set forth in Claimant's Exhibit 1, dated March 14, 1921, a copy of which is as follows (R. Vol. 2, p. 632):

"March 14, 1921.

Mr. C. B. Shaffer,
Chicago, Illinois.

Dear Mr. Shaffer: As I have endeavored to make clear, our interests wish to reach immediately a clear and distinct understanding of the basis of settlement of your interests with the Shaffer Oil & Refining Company.

Time is an all-important feature in this matter and we cannot wait beyond some definitely fixed date, and which I must ask you to fix at the present moment in order to complete the final delivery and transference of the monies, securities and other matters involved in the settlement.

Since leaving you, and before formally bringing the matter before my associates, I feel it is necessary that I should have from you the following distinct understanding, which is what you stated to me earlier this morning, namely:

In complete discharge and settlement of all matters involved we are to pay you:

Cash	$ 10,000.00
Six months' note	500,000.00
Twelve months' note	240,000.00

These notes to be secured by the Six Per Cent Coupon Notes of Standard Gas & Electric Company matur-

ing in 1935, and these notes to be lodged at 60 as collateral; that is to say, the $240,000.00 note is to have $400,000.00 of the Standard 1935's as collateral, and the $500,000.00 note is to have $833,000.00 of the Standard 1935's as collateral.

Above notes and collateral subject to approval of your attorney.

In addition, we are to deliver to you the cancellation of the lease of the Shaffer Company on the Bull Bayou, Louisiana tract; this cancellation to be effective as of the date of the execution and completion of this agreement.

At the date of the cancellation of the Louisiana Bull Bayou lease we are to pay all bills accumulated to that date and we are to receive and own all of the bills and accounts receivable of that lease.

You are to have the privilege of storing, at your own expense, or removing, at your own expense, from the Cushing refinery all of the apparatus, either now on storage or erected, which has been furnished by the S. S. E. Company, or which has been specifically provided for the purpose of operating the S. S. E. *units* by the Shaffer Company, as per Exhibit 'B'; and we will deliver to you a full release of Shaffer Oil & Refining Company of all claims under the S. S. E. contract.

You are to have the privilege of having this material remain on storage if you so elect for a period of eight months.

You also have the privilege of leaving on storage, without charge therefor, for a similar period of eight months, certain gas oil which is now stored on the Cushing tank farm, and that when you desire to remove this gas oil we will transport same, at your expense, from the tank to the loading rack.

In addition, we will obtain the release of Shaffer Oil & Refining Company to you of 1920 acres, located as set forth in the enclosed memorandum, drawn up by yourself, with the understanding that you are to select this acreage at the time of the signing of the agreement.

On your part, you are to deliver the following:

A cancellation in full for all claims against Shaffer Oil & Refining Company for oil which they have formerly borrowed from you and which is unreturned.

You are to deliver an annulment of the S. S. E. contract with the Shaffer Oil & Refining Company.

You are to deliver $200,000.00 par value of bonds of the Shaffer Oil & Refining Company, $5,000,000.00 par value of the preferred stock of Shaffer Oil & Refining Company and 80,000 shares of the common stock of Shaffer Oil & Refining Company.

You are to deliver the resignations of yourself, J. K. D. Shaffer, R. L. Erb, W. W. VanWinkle, C. E. Lewis and any other of the Officers, Directors and employees of the Shaffer Oil & Refining Company who have been placed there by yourself, and whose removal we may request at the time of the signing of the agreement.

You also agree to furnish *the resignations of yourself and your other nominee on the Voting Trust of Shaffer Oil & Refining Company Common Stock* and to join with us, if so desired, in a *dissolution of the Voting Trust.*

There will be delivered a quittance of claims as between yourself and ourselves and as between yourself and the Shaffer Oil & Refining Company.

All legal matters subject to the approval of the attorney for Shaffer and the attorney for H. M. Byllesby & Company.

The foregoing is my distinct understanding of the terms mentioned by you this morning, and which you accepted, and I wish to know that there is no misunderstanding of any description; also to impress upon you that it is important that this matter be brought to a settlement not later than the next ten days.

Yours very truly,

JJO TJM J. J. O'Brien.

The foregoing is accepted.

C. B. Shaffer."

In regard to this settlement with Shaffer, Mr. O'Brien testified (Tr. 40):

Q. "What was that modification?

A. Are you speaking of the return of the five million of preferred stock?

Q. Yes.

A. We found when Mr. Shaffer came in, while we bought his property, he came in as partner with us, in a sense a partner, he was a large stockholder. We wanted him particularly because of his knowledge of the oil business. That is the reason of the high price, we had supposed he was very able, and because of his oil experience. We found at the end of two years' time, maybe a little above that, the large sums of money we had raised for the Shaffer Oil & Refining Company had been spent without any results. We felt then we had paid entirely too much money in the way of stock and cash, and Col. Byllesby wrote Mr. Shaffer a letter and demanded a reduction in the amount that Mr. Shaffer had received.

Q. Reduction in stock?

A. Reduction in stock, yes. While I do not remember every last item of that, I know before we got through I was the person who contacted Mr. Shaffer, and he finally gave up five million of the preferred stock, which was cancelled. That would be 50,000 shares.

Q. He only received 44,000 of the preferred stock. When and how did Mr. Shaffer acquire the other 6,000 shares?

A. I cannot say. There are other men in the room who can answer that better than I can.

(NOTE: This 6000 preferred shares were issued to Shaffer for the Theta Oil Company properties.)

Q. What preferred stock he had he surrendered back to the company somewhere around 1921?

A. Yes, somewhere around there.

Q. And that stock was cancelled?

A. That stock was cancelled.

Q. Was it thereafter treated as treasury stock?

A. No, I think it was cancelled."

The Deep Rock's amended Articles of Incorporation acknowledged on June 1, 1921, and filed in the office of the Secretary of State of Delaware on June 7, 1921, provides for the cancellation of the Shaffer 50,000 shares of preferred stock and 80,000 shares of common stock, and these shares were retired from the capital structure.

(NOTE: It is well here to bear in mind that this corporation began business with a cash stock sale of only $5,120,000.00 (paid by H. M. Byllesby and Company or Standard as subscriber), a First Mortgage indebtedness of $12,000,000.00, plus a $2,000,000.00 note issued. All this with assets appraised as of January 1, 1919 (see Claimant's Exhibit 12), at $15,879,000.00. C. B. Shaffer had no sooner been eliminated in March, 1921, than the Deep Rock, under the direction of Standard, began to issue and sell to the public large note issues, namely *(a)* $2,000,000 under date of June 1, 1920, due June 1, 1921, and *(b)* $3,500,000.00 under date of May 1, 1921, due as follows: $1,000,000.00 May 1, 1922, $1,250,000.00 May 1, 1923, and $1,250,000.00 due May 1, 1924. (Tr. 646) Its net income from 1919 to 1932 and January and February, 1933, inclusive, was $10,071,739.33 (Claimant's Exhibits 13 and 14, R. Vol. 2, pp. 102-103, and 649-650) and gross earnings over the same period of time totaling $192,386,926.95. (R. Vol. 2, pp. 102-103, Claimant's Exhibits 13 and 14.) Interest paid and unpaid interest now claimed by Standard during that period was $15,287,448.92. (Claimant's Exhibit 14.) Although Claimant's Exhibits 13 and 14 show Deep Rock's net income from June 1, 1919, to March 1, 1933, was only $10,071,739.33, nevertheless the Standard's annual reports for the years 1922 to and including the year 1931 show the Standard reporting to the stockholders, creditors and the public that the Deep Rock had earned from the years 1922 to 1931, inclusive, $31,505,958.18. Francisco's appraisal of the property and all the assets (when receivers were appointed) was $12,000,000.00. (R., Vol. 2, p. 241) In spite of these enormous gross earnings the Deep Rock is utterly insolvent if the Standard's claim

is allowed in full and placed on an equal parity with those of the other creditors. Nothing but gross mismanagement could have brought about these results, or at least there is nothing in the record to refute the instant conclusion that this corporation has been grossly mismanaged and *manhandled.)*

(5) *Deep Rock Oil and Refining Company* is a corporation organized under the Delaware laws on *February 26 1923,* with an authorized capital stock of 15,000 shares, without nominal or par value (alleged by Trustee, R. Vol. 1, p. 113, and admitted by Standard, R. Vol. 1, p. 143).

The Articles of Incorporation provide that the stock "may be issued by the corporation from time to time for such consideration as may be fixed from time to time by the Board of Directors thereof; and such stock issue shall have no right of preemption." The original Delaware incorporators subscribed for ten shares which were later transferred. The Articles of Incorporation are a literal copy of the Articles of Incorporation of the Deep Rock with the exception of the capital structure and provisions for the issuance of stock.

(NOTE: Before going to Exhibit No. 28 (R. Vol. 2, p. 374) to "Stipulation" showing the Refining Company's issuance of stock, attention is called to the meeting of the Refining Company's Board of Directors held on March 22, 1923, shown by Exhibit No. 21 to "Stipulation." (R. Vol. 2, p. 362) The Refining Company's Directors at that meeting were all Standard Directors and officers, and four out of the five were Deep Rock Directors at the same time. The following resolution was passed by the Refining Company's Board at that meeting:

"Upon motion duly seconded and carried, the following preambles and resolutions were unanimously adopted:

"*Whereas,* J. C. Kennedy, Trustee, has offered to

sell, assign and transfer to this corporation property as follows:

> A contract made and entered into by and between the Bradstreet Oil Company and himself, dated February 15, 1923, and the property therein referred to, and also a contract between the Shaffer Oil and Refining Company and himself, dated February 17, 1923, relating to the operation of said property and the providing of working capital for same,

in full payment for nine thousand (9,000) shares of the stock of this corporation without nominal or par value, to be issued to him or his nominees and in full payment on behalf of the signers of the certificate of incorporation, for the shares of stock of this corporation, subscribed for by them, respectively, as shown by the certificate of incorporation; and

"*Whereas,* in the judgment of this board this property is necessary for the business of this corporation and is a good and sufficient consideration for the shares of stock demanded therefor;

"*Now, therefore,* be it

"*Resolved* that the offer of said J. C. Kennedy, Trustee, to assign the said contracts and to sell to this corporation the property hereinbefore described, be and it is hereby accepted and that the President and Secretary of this corporation be and they hereby are authorized and directed to execute in the name and in behalf of this corporation and under its corporate seal such agreement or agreements as may be necessary for the purchase of said property in accordance with said offer.

"*Further resolved* that the President and the Secretary be and they hereby are authorized and directed to issue and deliver in payment for said property, in accordance with said offer, certificates of full paid capital stock of this corporation to the said J. C. Kennedy, Trustee, or his nominees, for an aggregate of eight thousand nine hundred and ninety (8,990) shares and to

the signers of the certificate of incorporation, or to their respective assigns, for the ten (10) shares subscribed for by them as shown by the certificate of incorporation.")

Kerr, in answer to the 20th interrogatory, to-wit, "As the Refining Company never had a bank account, are we correct in stating that the Refining Company never itself paid for any of the properties standing in its name or the name of R. J. Graf or J. C. Kennedy?" said:

"The records of the Deep Rock Oil and Refining Company show that it issued 9,000 share of its no par value capital stock in payment of oil properties purchased from the Bradstreet Oil Company by J. C. Kennedy, Trustee, and that it credited the open account of Standard Gas and Electric Company in the amount of $1,894,592.11 to cover accounts as shown by the books of Deep Rock Oil Corporation against R. J. Graf, Trustee, and J. C. Kennedy, Trustee, which were assumed by Standard Gas and Electric Company as of October 1, 1925. The accounts with R. J. Graf, Trustee, and J. C. Kennedy, Trustee, assumed by Standard Gas and Electric Company, represented net advances made by Deep Rock Oil Corporation to R. J. Graf, Trustee, and J. C. Kennedy, Trustee, and/or Deep Rock Oil and Refining Company for construction of and improvements to the cracking plant and for the purchase and development of oil and gas properties prior to October 1, 1925.

"On December 31, 1926, Deep Rock Oil and Refining Company issued its demand note in favor of Standard Gas and Electric Company in the amount of $1,894,592.11 in settlement of this portion of its open account."

Ambiguous Status Cleared Up.

Kerr's answer, above quoted, is ambiguous and confusing. There is no conflict in the evidence and it shows the following: The original Bradstreet properties and invoices

purchased in the name of J. C. Kennedy, Trustee, from Bradstreet Oil Company under written contract of February 15, 1923, cost $650,000.00, $500,000.00 of which was paid direct by Standard to Bradstreet Oil Company and the other $150,000.00 covered by Deep Rock's three $50,000.00 promissory notes which were subsequently paid by Standard and charged along with the $500,000.00, making $650,000.00 by Standard to J. C. Kennedy, Trustee. That account was opened up in February, 1923. (See Knourek's answer to the 13th and 42nd interrogatories.) As shown by Knourek's answer to the 64th interrogatory this account was really against the Deep Rock and *so considered by the Standard inasmuch as the Standard charged Deep Rock interest on the J. C. Kennedy account from the origin of the account until December, 1925,* when Standard reversed the October, November and December interest charges, thus limiting Standard's interest charges on the J. C. Kennedy, Trustee, account against Deep Rock to a period ending with October, 1925, the date of first lease. (Exhibit Y, Knourek's interrogatories, R., Vol. 3, pp. 56, etc.)

As shown by the testimony of Francisco (Tr. 197, 198, 208, 209, 216, 217, and Francisco's answer to the 47th interrogatory) the Deep Rock had expended in the development and additional leases to the Bradstreet properties from the date of their acquisition in February, 1923, to October 1, 1925, the sum of $1,033,294.32, and in the construction, installation, etc., of the Dubbs stills and cracking plant, $861,297.79, making a total of $1,894,592.11.

As shown by Braheney's letter of December 22, 1925, addressed to O. O. Kerr, Deep Rock's General Auditor (Trustee's Exhibit "Eye"—see copy, page 71 herein) the Standard purported to purchase 8,325 shares of Refining Company stock from the Deep Rock for $649,999.00, which represented the original cost of the Bradstreet properties,

to-wit, $650,000.00, and by that purported purchase Standard cancelled its open account against J. C. Kennedy, Trustee, and charged the same to itself, which, as shown by Exhibit "A" to Standard's claim, operated in effect as charging the Deep Rock with $649,999.00 and then crediting Deep Rock on the same day with a like amount.

Standard never charged R. J. Graf, Trustee, with the cost of the construction and installation of the Dubbs stills and cracking plant. The Deep Rock paid that $861,297.79. Although the Standard, as of October 1, 1925, credited Deep Rock with $1,894,592.11 (composed of the cost of the cracking plant, $861,297.79, and the cost of the additions and developments of the Bradstreet property, $1,033,294.32), that credit was no consideration for Standard's purported purchase of the Refining Company's stock. What the Standard did was credit the Deep Rock with the $1,894,592.11 and charge the same to the Refining Company on open account, for which in 1926, the Refining Company executed its note to the Standard. (See Knourek's answer to 52 interrogatory and testimony, Tr. 596-597.) In other words, this was merely a transfer of Standard's open account to the amount of $1,894,592.11 from a charge against Deep Rock to a charge against the Refining Company. It is obvious that Standard by this means placed itself in a position to wipe out the Refining Company by a judgment on the open account or the note the Refining Company executed to it covering the open account. These facts will be developed more definitely in the following pages.

Exhibit No. 28 to the "Stipulation," being a photostatic copy of the Refining Company's stock transfer book, shows the following:

(a) On March 22, 1923, stock certificate No. 1, for 10 shares, was issued to R. J. Graf.

(b) On that same date, R. J. Graf executed what is titled "Irrevocable Stock Power," but in fact was a ansfer by which he assigned and transferred the 10 shares the following persons, with the number of shares set opsite each of their names:

R. J. Graf	—	2 shares
R. H. Hunt	—	2 shares
B. W. Lynch	—	2 shares
A. S. Cummins	—	2 shares
J. H. Briggs	—	2 shares

As shown by Exhibit No. 12 to the "Stipulation," Graf, nch and Cummins were directors and Graf, Lynch, Hunt d Briggs were officers of the Engineering and Manageent Corporation at that time.

Exhibit No. 13 to the "Stipulation" shows Cummins d Graf were Directors of Byllesby and Company at that ne.

Exhibit No. 14 to the "Stipulation" shows that Cumns, Briggs, Graf, Hunt and Lynch at that time were Dictors of the Standard, and that Lynch and Graf were tive officers of the Standard.

Exhibit No. 15 to the "Stipulation" shows Graf, iggs, Cummins and Lynch were Deep Rock directors at t time.

(c) Exhibit No. 28 shows that on March 22, 1923, Certicate No. 2 for two shares was issued to R. J. Graf and ll outstanding.

(d) Certificate No. 3 was issued to R. G. Hunt on March , 1923, for two shares, and on March 27, 1925, was asgned to J. L. Gray, but apparently the certificate was ver delivered to Hunt as it still remains in the stock transr book.

(e) On March 22, 1923, certificate No. 4, for two

shares, was issued to B. W. Lynch, and is apparently still outstanding.

(f) On March 22, 1923, certificate No. 5, for two shares, was issued to A. S. Cummins, but was apparently never delivered, although on March 27, 1925, Cummins executed an assignment of the two shares to L. B. Riddle. The stock certificate stub recites that these two shares were "transferred from R. J. Graf."

(g) Certificate No. 6, for two shares, was issued on March 22, 1923, to J. H. Briggs, but apparently was never delivered as it still remains in the stock book. J. H. Briggs executed an assignment in blank on the .. day of ...., 19...

(h) Certificate No. 7, for 8990 shares, dated March 22, 1923, was issued in the name of J. C. Kennedy, Trustee, and noted on the stub as "transferred from original issue." This certificate was apparently never delivered to J. C. Kennedy as it still remains in the stock book, but on the same day, March 22, 1923, J. C. Kennedy, Trustee, assigned and transferred the certificate to M. A. Morrison. As shown by Exhibit No. 15 to "Stipulation" M. A. Morrison was at that time a Deep Rock director; he was a director of Deep Rock continuously from 1922 to and including 1934, as shown by said Exhibit No. 15. Exhibit No. 16 to "Stipulation" shows Morrison was Deep Rock's Assistant Secretary and Assistant Treasurer from 1922 to 1934, inclusive. As shown by Exhibit No. 14 to "Stipulation" Morrison was at that time also a Standard Director and Assistant Secretary and Assistant Treasurer. As shown by Exhibit No. 13 to the "Stipulation" Morrison at that time was also a director of Byllesby and Company, and as shown by Exhibit No. 12 to the "Stipulation" Morrison was also at that time a director, Vice-President, Assistant Treasurer and Secretary of the Engineering and Management Corporation.

(i) Certificate No. 8, for 8990 shares, was issued, or rather made out, to M. A. Morrison on March 22, 1923, with a notation on the stub "Transferred from J. C. Kennedy, Trustee." This certificate was never apparently delivered as it still remains in the stock book.

(j) Certificate No. 9, for 8325 shares, was issued to M. A. Morrison on March 22, 1923, with notation on the stub "Transferred from M. A. Morrison." This left standing in the name of M. A. Morrison 665 shares.

(k) Certificate No. 10, for 665 shares, was issued to M. A. Morrison on March 22, 1923, with the notation on the stub "Transferred from M. A. Morrison."

(l) Certificate No. 11, for two shares, was issued to J. L. Gray on March 27, 1925, with notation on the stub, "Transferred from R. G. Hunt." This certificate was apparently never delivered as it still remains in the stock book, but Gray, on the .... day of ....., 19.., signed the so-called "Irrevocable Stock Power" by which he transferred the two shares to B. L. Majewski. As shown by Exhibit No. 15 to the "Stipulation" Majewski became for the first time a Deep Rock director in March, 1928, and remained a director to and including 1934.

(m) Cetificate No. 12, for two shares, was issued to L. B. Riddle on March 27, 1925, with notation on the stub, "Transferred from A. S. Cummins." This certificate appears to have never been delivered as it still remains in the stock book, but on the .... day of ....., 19.., L. B. Riddle assigned the two shares to Richard K. Huey. As shown by Exhibit No. 15 to the "Stipulation" Richard K. Huey became a Deep Rock director on January 1, 1922, and remained a Deep Rock director from 1922 to 1934, inclusive. As shown by Exhibit No. 16 to the "Stipulation" Richard K. Huey became Deep Rock's Assistant Secretary and As-

sistant Treasurer in 1925, and remained as such officers continuously from 1925 to 1934, inclusive.

(n) Certificate No. 13, for two shares, was issued on April 7, 1926, to W. R. Francisco, with notation on the stub "Transferred from J. H. Briggs." This certificate was delivered to Francisco.

(o) Certificate No. 14, for two shares, was issued to B. L. Majewski on April 14, 1933, with notation on the stub "Transferred from J. L. Gray." As Gray's Certificate No. 11 for two shares was never delivered to him, it is plain that Certificate No. 14, issued to Majewski on April 14, 1933, was under the authority of Gray's transfer of blank date.

(p) Certificate No. 15, for two shares, was issued to Richard K. Huey on April 14, 1933, with notation on the stub "Transferred from L. B. Riddle." As Certicfiate No. 12 to L. B. Riddle was never delivered to Riddle, it is apparent that the certificate for two shares issued to Huey on April 14, 1933, was under the authority of Riddle's assignment of blank date.

With regard to the issuance of stock, see Francisco's testimony. (Tr. 201 to 208) The Refining Company was organized as a department of the Deep Rock and the Deep Rock owned all its stock, as the evidence will show. The evidence further shows, as hereafter pointed out, that the properties of the Refining Company were absolutely essential to the life of the Deep Rock, and in so far as the Deep Rock's creditors are concerned, the separate corporate entity of the Refining Company will be ignored, and all of its physical properties or its stock should be and will be treated as assets of the Deep Rock for the payment of debts of the Deep Rock.

According to Kerr's answer to the 18th interrogatory the following persons have been the Refining Company's Presidents:

R. G. Hunt, from March 22, 1923, to March 26, 1925;
John L. Gray, from March 27, 1925, to April 14, 1933;
B. L. Majewski, from April 15, 1933, to December 18, 1934.

R. G. Hunt was Vice-President of the Engineering and Management Corporation in 1923, 1924 and 1925, and a member of its Board of Directors in 1925, and still occupies the office of Director and Vice-President of that corporation. (See Exhibit 12 to "Stipulation.") Hunt was also a Director of H. M. Byllesby and Company during the years 1925, 1926, 1927, 1928, 1929, 1930, 1931 and 1932. (See Exhibit 13 to "Stipulation.") He was also a Director of Standard in 1922, 1923, 1924, 1925, 1926, 1927 and 1928, and Standard's Vice-President during the years 1926 to 1932, inclusive. (See Exhibit 14 to "Stipulation.")

Gray's and Majewski's subserviency to the Standard will be hereafter pointed out.

Kerr, in his answer to the 22nd interrogatory, sets forth the names and terms of service of the Refining Company's secretaries, treasurers, assistant secretaries and assistant treasurers, as follows:

"*(a)* Secretary	March 22, 1923, to March 26, 1925	R. J. Graf
	Elected on March 27, 1925, and still holding office on December 18, 1934	W. R. Francisco
"*(b)* Treasurer	March 22, 1923, to March 26, 1925	R. J. Graf
	Elected on March 27, 1925, and still holding office on December 18, 1934	W. R. Francisco
"*(c)* Asst. Sec.	March 22, 1923 to June 1, 1923	B. W. Lynch

June 2, 1923, to April 6, 1926
B. W. Lynch
A. L. Dade
J. C. Kennedy

April 7, 1926, to June 27, 1926
Herbert List
A. L. Dade
J. C. Kennedy

June 28, 1926, to Sept. 12, 1926
Herbert List
A. L. Dade

Sept. 13, 1926, to Feb. 18, 1931
Herbert List
A. L. Dade
O. O. Kerr

Elected on Feb. 19, 1931, and still holding office on Dec. 18, 1934
Herbert List
A. L. Dade
O. O. Kerr
J. J. Madden
P. A. Lehmkuhl

"*(d)* Asst. Treas. March 22, 1923, to June 1, 1923
J. H. Briggs

June 2, 1923, to March 26, 1925
J. H. Briggs
W. R. Francisco
O. O. Kerr

March 27, 1925, to Feb. 18, 1931
J. H. Briggs
O. O. Kerr

Elected on Feb. 19, 1931, and still holding office on Dec. 18, 1934
J. H. Briggs
O. O. Kerr
J. J. Madden
P. A. Lehmkuhl."

Interlocking Officialism and Directorates.

H. M. Byllesby was founder of H. M. Byllesby & Company (Tr. 3) and its President from the date of its organization in 1904 up until the date of his death. (Tr. 27) He died in May, 1924. (Tr. 2)

Standard's Annual Report for the year ending December 31, 1924 (Trustee's Exhibit ..), page 6, states that "Colonel Byllesby, who was the founder and president of Standard Gas and Electric Company, died May 1, at the age of 65."

H. M. Byllesby was President of the Standard Gas and Electric Company from its organization until the date of his death in May, 1924. (Tr. 2)

John J. O'Brien succeeded H. M. Byllesby as President of the Standard and also as President of H. M. Byllesby & Company. (Tr. 2) John J. O'Brien was treasurer and general auditor of H. M. Byllesby & Company in the early days of its life. (Tr. 2) Thus we have H. M. Byllesby founder of H. M. Byllesby & Company, a Delaware corporation, and likewise founder of the Standard Gas and Electric Company, a Delaware corporation. H. M. Byllesby was likewise President of the Byllesby Engineering and Management Corporation from the date of its organization until the date of his death in 1924, and Mr. O'Brien has been its President since the date of Byllesby's death. (Tr. 25)

C. B. Shaffer was the first President of Deep Rock Oil Corporation. (Tr. 11) He resigned in the Spring of 1921 and was succeeded by George Moore, a Deep Rock employee in charge of refining operations who in turn was succeeded by a Standard representative, Henry C. Cummins, in 1922 (Tr. 135), who was in turn succeeded by Mr. O'Brien in 1924.

H. C. Cummins has been connected with the Standa since its organization (Tr. 135) and a Director since 19 (Knourek's answer to the 60th interrogatory), and lik wise connected with the Deep Rock since its organizati and served from 1922 to June, 1924, as President of De Rock (Tr. 147), and has been continuously a director Deep Rock since June 6, 1919. (Ex. 15 to Stipulation.)

Upon Shaffer's resignation as President of Deep Ro Cummins became executive assistant to President Moo and continued in that capacity until June, 1922, wh Moore resigned and was succeeded by Cummins. (Tr. 13

The Deep Rock's offices were a part of the time in t same building with the Standard's directly across the ha then moved to an office building across the street from t Standard's office. All the general offices of the Deep Ro were maintained in Chicago, as above stated, the produ ing and land office being at Tulsa, Oklahoma, but as sa by Cummins, "Our general offices were here," meanin Chicago. (Tr. 137-138) Cummins was employed by th Standard since its organization and then became a Stan ard official in 1924. (Tr. 144-145) He came up through th ranks. His father, who died in 1914 (Tr. 146), was, durin his lifetime, attorney for the Standard and also H. M. By lesby and Company. (Tr. 145) His first connection wit Deep Rock was Vice-President under Moore, who was a old, experienced oil operator. (Tr. 147) The Deep Ro paid Cummins' salary as Vice-President and also as Pres dent. (Tr. 147)

Mr. O'Brien testified that H. C. Cummins is now Vice President of the Standard and has been associated wit H. M. Byllesby for a number of years, and that he think he has been a Director of the Standard for 15 or 20 years (Tr. 33)

(NOTE: In fact Cummins was a Standard Directo

in 1919, and every year since. See Knourek's answer to 60th interrogatory, and Exhibit No. 14 to "Stipulation.")

Mr. O'Brien, as President of Deep Rock since 1924 down to date, has never received any salary from the Deep Rock, the Byllesby Engineering and Management Corporation paying him an annual salary covering his services as President and executive official of Standard and other subsidiary Standard corporations. (Tr. 13-14)

Deep Rock's Board of Directors and Officers.

Ever since the elimination of C. B. Shaffer in 1921, Exhibits Nos. 12 to 15, inclusive, to "Stipulation" show that more than a majority of the Deep Rock's Board of Directors have also been Standard Directors, and directors of the Engineering and Management Corporation, and some of them directors of Byllesby and Company.

Exhibit No. 15 to the "Stipulation," page 2, shows that certain Shaffer directors resigned on March 18, 1921, and in their stead there was elected

H. C. Cummins
G. N. Moore
W. R. Thompson
B. W. Lynch
M. A. Morrison

and that at a directors' meeting on May 4, 1921, F. W. Stehr was elected director; R. K. Huey was elected director on June 8, 1921, and W. R. Thompson, who served as Deep Rock director a short time, resigned on June 29, 1921.

1921

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. M. Byllesby	H. M. Byllesby	H. M. Byllesby	H. M. Byllesb
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
A. S. Huey	A. S. Huey	A. S. Huey	A. S. Huey
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
Otto E. Osthoff	Otto E. Osthoff	Otto E. Osthoff	Otto E. Osthof
*H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummin
*G. N. Moore	———	———	———
*W. R. Thompson	———	———	———
*B. W. Lynch	B. W. Lynch	B. W. Lynch	———
*M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
*F. W. Stehr	F. W. Stehr	———	———
*R. K. Huey	———	———	———

*Cummins, Moore, Thompson, Lynch and Morrison were elec Directors of Deep Rock at a meeting held on March 18, 1921, to succ five resigning members. Stehr was elected Director of Deep Rock a meeting held on May 4, 1921; Huey was elected Director of Deep Ro at a meeting held June 8, 1921, and W. R. Thompson resigned on Ju 29, 1921.

During the year 1921 Byllesby was President of Eng neering and Management Corporation, Lynch was Assi ant Treasurer and Assistant Secretary of Engineering a Management Corporation, Morrison was Assistant Trea urer and Assistant Secretary of Engineering and Manag ment Corporation, Graf, Huey, O'Brien, and Osthoff we Vice-Presidents of the Management Corporation; Graf w also Secretary of Engineering and Management Corpor tion, and O'Brien was also its Treasurer.

1922

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
G. N. Moore	----------	----------	----------
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
A. S. Huey	A. S. Huey	A. S. Huey	A. S. Huey
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
Otto E. Osthoff	Otto E. Osthoff	Otto E. Osthoff	Otto E. Osthoff
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	----------
F. W. Stehr	F. W. Stehr	----------	----------
H. M. Byllesby	H. M. Byllesby	H. M. Byllesby	H. M. Byllesby
Richard K. Huey	----------	----------	----------

At a meeting of the Board of Directors of Deep Rock on June 22, 1922, two directors were added, to-wit: W. R. Francisco and W. H. Cannady. At a meeting of the Board of Directors of Deep Rock on December 26, 1922, Osthoff resigned and was succeeded by J. H. Briggs.

During the year 1922 Byllesby was President of Engineering and Management Corporation, Graf, Huey, O'Brien and Osthoff were Vice-Presidents of Engineering and Management Corporation, O'Brien was Treasurer of Engineering and Management Corporation, M. A. Morrison was Assistant Secretary and Assistant Treasurer of Byllesby Engineering and Management Corporation, and Lynch was Assistant Secretary and Assistant Treasurer of Byllesby Engineering and Management Corporation.

1923

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. M. Byllesby	H. M. Byllesby	H. M. Byllesby	H. M. Byllesby
G. N. Moore	.....	.....	———
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
A. S. Huey	A. S. Huey	A. S. Huey	A. S. Huey
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
W. R. Francisco	.....	.....	———
F. W. Stehr	F. W. Stehr	———	———
J. H. Briggs	J. H. Briggs	.....	———
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	———
R. K. Huey	.....	.....	———
W. H. Cannady	.....	.....	———
A. S. Cummins	A. S. Cummins	A. S. Cummins	A. S. Cummins

During the year 1923 Byllesby was President of bot the Standard and Engineering and Management Corpor tion; Graf was Secretary and Treasurer of the Standar and Vice-President of Engineering and Management Co poration; Huey was Vice-President of the Standard O'Brien was Vice-President of the Standard and Vic President and Treasurer of Engineering and Managemen Corporation; Morrison was Assistant Secretary and Assis ant Treasurer of Standard, and Vice-President, Secretar and Assistant Treasurer of Engineering and Managemen Corporation; B. W. Lynch was Vice-President of the Stand ard, and Vice-President and Assistant Treasurer of Engi neering and Management Corporation.

1924

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. M. Byllesby	.....	.....	H. M. Byllesby
G. N. Moore	.....	.....	.....
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
A. S. Huey	.....	A. S. Huey	A. S. Huey
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
W. R. Francisco	.....	.....	.....
F. W. Stehr	F. W. Stehr	.....	.....
J. H. Briggs	J. H. Briggs	J. H. Briggs	.....
A. S. Cummins	A. S. Cummins	A. S. Cummins	A. S. Cummins
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	.....
R. K. Huey	.....	.....	.....
W. H. Cannady	.....	.....	.....
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins

During the year 1924 Graf was First Vice-President of Standard and Engineering and Management Corporation and Treasurer of Engineering and Management Corporation; Huey was Chairman of the Board of Engineering and Management Corporation; O'Brien was President of Standard and Engineering and Management Corporation; Briggs was Vice-President of Standard and Assistant Treasurer and Assistant Secretary of Engineering and Management Corporation; A. S. Cummins was Vice-President of Standard; Morrison was Secretary and Treasurer of Standard and Vice-President and Secretary of Engineering and Management Corporation; Lynch was Vice-President of Standard and Vice-President and Assistant Treasurer of Engineering and Management Corporation.

1925

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
J. L. Gray	.....	.....	.....
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
A. S. Cummins	A. S. Cummins	A. S. Cummins	A. S. Cummins
W. R. Francisco	.....	.....	.....
G. N. Moore	.....	.....	.....
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	.....	.....	.....
F. W. Stehr	F. W. Stehr	.....	.....
*J. H. Roemer	J. H. Roemer	.....	J. H. Roemer
*R. G. Hunt	R. G. Hunt	R. G. Hunt	R. G. Hunt
*O. G. Corns	O. G. Corns	.....	.....

*Roemer, Hunt and Corns were elected Directors of Deep Rock at a meeting held on March 9, 1925. At the same meeting G. N. Moore resigned and L. B. Riddle was elected to succed him.

During the year 1925 O'Brien was President of both the Standard and Engineering and Management Corporation; Graf was First Vice-President of the Standard and First Vice-President and Treasurer of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard, and Vice-President and Secretary of Engineering and Management Corporation; A. S. Cummins was Vice-President of Standard; Briggs was Vice-President of Standard, and Assistant Treasurer and Assistant Secretary of Engineering and Management Corporation; Lynch was Vice-President of Standard and Vice-President and Assistant Treasurer of Engineering and Management Corporation; Hunt was Vice-President of Engineering and Management Corporation.

1926

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
J. L. Gray	.....	.....	.....
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
A. S. Cummins	A. S. Cummins	A. S. Cummins	A. S. Cummins
W. R. Francisco	.....	.....	.....
J. H. Briggs	J. H. Briggs	J. H. Briggs	J.H. Briggs
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	.....	.....	.....
F. W. Stehr	F. W. Stehr	.....	.....
L. R. Riddle	.....	.....	.....
R. G. Hunt	R. G. Hunt	R. G. Hunt	R. G. Hunt
O. G. Corns	O. G. Corns	.....	.....
J. H. Roemer	J. H. Roemer	.....	J. H. Roemer

During the year 1926 J. J. O'Brien was President of both the Standard and Engineering and Management Corporation; Graf was First Vice-President of Standard, and First Vice-President and Treasurer of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard, and Vice-President and Secretary of Engineering and Management Corporation; H. C. Cummins was Vice-President of Standard; Briggs was Vice-President of Standard, and Assistant Treasurer and Assistant Secretary of Engineering and Management Corporation; Lynch was Vice-President of Standard, and Vice-President and Assistant Treasurer of Engineering and Management Corporation; Hunt was Vice-President of both Standard and Engineering and Management Corporation.

1927

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
J. L. Gray	———	———	———
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
A. S. Cummins	A. S. Cummins	A. S. Cummins	A.S. Cummins
W. R. Francisco	———	———	———
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	———	———	———
F. W. Stehr	F. W. Stehr	———	———
L. B. Riddle	———	———	———
R. G. Hunt	R. G. Hunt	R. G. Hunt	R. G. Hunt
O. G. Corns	O. G. Corns	———	———
J. H. Roemer	J. H. Roemer	———	J. H. Roemer

During the year 1927, O'Brien was President of bo the Standard and Engineering and Management Corpor tion; Graf was First Vice-President of Standard and Fi Vice-President and Treasurer of Engineering and Manag ment Corporation; Morrison was Secretary and Treasur of Standard and Vice-President and Secretary of Enginee ing and Management Corporation; H. C. Cummins was Vic President of Standard; Briggs was Vice-President Standard, and Assistant Treasurer and Assistant Secreta of Engineering and Management Corporation; Lynch w Vice-President of Standard and Vice-President and Assi ant Treasurer of Engineering and Management Corpor tion; Hunt was Vice-President of Standard and also Vic President of Engineering and Management Corporation.

1928

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
J. L. Gray	J. L. Gray	.....	.....
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
*A. S. Cummins	A. S. Cummins	A. S. Cummins	A. S. Cummins
W. R. Francisco	.....	.....	.....
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	.....	.....	.....
F. W. Stehr	F. W. Stehr	.....	.....
L. B. Riddle	.....	.....	.....
R. G. Hunt	R. G. Hunt	R. G. Hunt	R. G. Hunt
O. G. Corns	O. G. Corns	.....	.....
*J. H. Roemer	J. H. Roemer	.....	J. H. Roemer

*At a meeting of the Board of Directors of Deep Rock held on January 11, 1928, A. S. Cummins resigned and W. E. Moody was elected director to succeed him; J. H. Roemer resigned and B. L. Majewski was elected director to succeed him. Neither Moody nor Majewski were directors of either the Standard, Engineering and Management Corporation or Byllesby and Company during the year 1928.

During the year 1928, J. J. O'Brien was President of both Standard and Engineering and Management Corporation; Graf was First Vice-President of Standard, and First Vice-President and Treasurer of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard, and Vice-President and Secretary of Engineering and Management Corporation; H. C. Cummins was Vice-President of Standard; Briggs was Vice-President of Standard and Assistant Treasurer and Assistant Secretary of Engineering and Management Corporation; Lynch was Vice-President of Standard, and Vice-President and Assistant Treasurer of Engineering and Management Corporation; Hunt was Vice-President of both Standard and Engineering and Management Corporation.

1929

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. C. Cummins	———	H. C. Cummins	H. C. Cummins
J. L. Gray	———	———	———
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
W. R. Francisco	———	———	———
L. B. Riddle	———	———	———
B. L. Majewski	———	———	———
J.H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	———	———	———
W. E. Moody	———	———	———
F. W. Stehr	———	———	———
R. G. Hunt	———	R. G. Hunt	R. G. Hunt
O. G. Corns	———	———	———

During the year 1929, H. C. Cummins was Vice-Pres dent of Standard; O'Brien was President of both Standar and Engineering and Management Corporation; Graf wa First Vice-President of Standard and First Vice-Preside and Treasurer of Engineering and Management Corpor tion; Briggs was Vice-President of Standard and Assista Treasurer and Assistant Secretary of Engineering an Management Corporation; Morrison was Secretary an Treasurer of Standard and Vice-President and Secretary Engineering and Management Corporation; Lynch wa Vice-President of Standard, and Vice-President and Assis ant Treasurer of Engineering and Management Corpor tion; Hunt was Vice-President of Standard and also Vic President of Engineering and Management Corporation.

1930

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
J. L. Gray	———	———	———
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
W. R. Francisco	———	———	———
L. R. Riddle	———	———	———
R. L. Majewski	———	———	———
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	———	———	———
W. E. Moody	———	———	———
F. W. Stehr	———	———	———
R. G. Hunt	———	R. G. Hunt	R. G. Hunt
O. G. Corns	———	———	O. G. Corns

During the year 1930 H. C. Cummins was Vice-President of Standard; O'Brien was President of both Standard and Engineering and Management Corporation; Graf was First Vice-President of Standard and First Vice-President and Treasurer of Engineering and Management Corporation; Briggs was Vice-President of Standard and Assistant Secretary of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard and Vice-President and Secretary of Engineering and Management Corporation; Lynch was Vice-President of both Standard and Engineering and Management Corporation; Hunt was Vice-President of both Standard and Engineering and Management Corporation.

1931

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
H. C. Cummins	H. C. Cummins	H. C. Cummins	H. C. Cummins
J. L. Gray	———	———	———
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
W. R. Francisco	———	———	———
L. B. Riddle	———	———	———
B. L. Majewski	———	———	———
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	———	———	———
W. E. Moody	———	———	———
F. W. Stehr	———	———	———
R. G. Hunt	———	R. G. Hunt	R. G. Hunt
O. G. Corns	———	———	O. G. Corns

(Note. At a meeting of the Directors of Deep Rock held on March 20, 1931, W. G. Pohl, J. J. Madden and P. A. Lehmkuhl were elected Deep Rock Directors, and on March 24, 1931, Pohl, Madden and Lehmkuhl resigned. Pohl was Director of Engineering and Management Corporation in 1931.)

During the year 1931 H. C. Cummins was Vice-President of Standard; O'Brien was President of both Standard and Engineering and Management Corporation; Graf was First Vice-President of Standard, and First Vice-President and Treasurer of Engineering and Management Corporation; Briggs was Assistant Secretary of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard, and Vice-President and Secretary of Engineering and Management Corporation; Lynch was Vice-President of Standard; Hunt was Vice-President of both the Standard and Engineering and Management Corporation.

1932

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
J. L. Gray	.....	.....	.....
H. C. Cummins	H. C. Cummins	H. C. Cummins	.....
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
W. R. Francisco	.....	.....	.....
L. B. Riddle	.....	.....	.....
R. L. Majewski	.....	.....	.....
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
M. A. Morrison	M. A. Morrison	M. A. Morrison	M.A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	.....	.....	.....
W. E. Moody	.....	.....	.....

During the year 1932 O'Brien was President of both Standard and Engineering and Management Corporation; H. C. Cummins was Vice-President of both Standard and Engineering and Management Corporation; Graf was First Vice-President of Standard and First Vice-President and Treasurer of Engineering and Management Corporation; Briggs was Vice-President of Standard and Assistant Secretary of Engineering and Management Corporation; Morrison was Secretary and Treasurer of Standard and Vice-President and Secretary of Engineering and Management Corporation; Lynch was Vice-President of both Standard and Engineering and Management Corporation.

1933

Deep Rock Directors	Standard Directors	Engineering and Management Corporation Directors	Byllesby and Company Directors
J. J. O'Brien	J. J. O'Brien	J. J. O'Brien	J. J. O'Brien
J. L. Gray	———	———	———
H. C. Cummins	H. C. Cummins	H. C. Cummins	———
R. J. Graf	R. J. Graf	R. J. Graf	R. J. Graf
W. R. Francisco	———	———	———
L. B. Riddle	———	———	———
B. L. Majewski	———	———	———
J. H. Briggs	J. H. Briggs	J. H. Briggs	J. H. Briggs
M. A. Morrison	M. A. Morrison	M. A. Morrison	M. A. Morrison
B. W. Lynch	B. W. Lynch	B. W. Lynch	B. W. Lynch
R. K. Huey	———	———	———
W. E. Moody	———	———	———

(Note. At a meeting of the Directors of Deep Rock held on Ma 4, 1933, J. L. Gray resigned as Director and Wm. G. Pohl was elec to succeed him; L. B. Riddle resigned as Director and J. J. Madden elected to succeed him. Wm. G. Pohl was a Standard Director dur 1933 and J. J. Madden was Director of Engineering and Managem Corporation during 1933.)

During the year 1933 O'Brien was President of En neering and Management Corporation; H. C. Cummins a Lynch were Vice-Presidents of Engineering and Mana ment Corporation; Graf was First Vice-President a Treasurer of Engineering and Management Corporati Briggs was Assistant Secretary of Engineering and M agement Corporation; Morrison was Vice-President Secretary of Engineering and Management Corporatio

1934

Deep Rock Directors.

J. J. O'Brien
Wm. G. Pohl
H. C. Cummins
R. J. Graf
J. J. Madden
B. L. Majewski
J. H. Briggs
M. A. Morrison
B. W. Lynch
W. R. Francisc
R. K. Huey
W. E. Moody

Deep Rock Officers.

Exhibit No. 16 to "Stipulation" (R. Vol. 2, p. 338) shows the Deep Rock's Officers from June 6, 1919, to 1934, inclusive.

Exhibit No. 14 to the "Stipulation" shows Standard's Directors from 1910 to 1922, inclusive, and Standard's Directors and *Officers* from 1923 to 1932, inclusive, and Standard's Directors for 1933.

An examination of pages 1, 2 and 3, of Exhibit No. 16 to "Stipulation" shows Deep Rock's officers for the years 1919 to 1922, inclusive, with the exception of C. B. Shaffer, President, were each and every one officers or directors of the Standard.

A comparison of the Standard's officers, beginning on page 3 of Exhibit No. 14 to "Stipulation" with the Deep Rock's officers beginning on page 4 of Exhibit No. 16 to "Stipulation" shows that all the Deep Rock's officers for the years 1923 to 1932, inclusive, were likewise officers of the Standard for the same years, with the exception of the following Deep Rock Officers, namely:

L. B. Riddle
W. E. Moody
W. R. Francisco
J. C. Kennedy
A. L. Dade
O. O. Kerr

H. M. Byllesby was Chairman of the Deep's Rock Board of Directors from March 31, 1920, until his death in 1925, as shown by the testimony of Mr. O'Brien, and also disclosed by Exhibit No. 16 to "Stipulation." A comparison of Standard's Officers from 1923 to 1932, inclusive, as shown by Exhibit No. 14 to "Stipulation," with the Deep Rock's Officers, as shown by Exhibit No. 16 to "Stipulation," shows that at all times the Standard's Executive Officers, who resided in Chicago, were in absolute control

of the Deep Rock as its Officers. In 1922 H. C. Cummi was Vice-President and Secretary of the Deep Rock, W. Lynch was A sistant Secretary, Morrison was Assi ant Treasurer. In fact, every year since the eliminati of C. B. Shaffer, Standard's Officers residing in Chica have occupied substantially all the offices of the Deep Ro for each and every year. The Standard was in a positi to do anything it wanted to with the affairs of the De Rock, through its President, who resided in Chicago, Vi Presidents, Assistant Secretaries and Assistant Treas ers, who also resided in Chicago.

It is very noticeable that for each and every year Deep Rock had four or five Assistant Secretaries and fo or five Assistant Treasurers who resided in Chicago a occupied similar offices with the Standard.

Turning to Exhibit No. 12 to the "Stipulation" it w be observed that many of the officers o the Engineeri and Management Corporation were likewise officers of Deep Rock. At no time did the Deep Rock have in Ok homa a quorum of the Board of Directors or any Exe tive Officers with power to function independent of instr tions from the Chicago offices. The Standard's officers a directors at all times, by virtue of their positions as rectors and Executive Officers of the Deep Rock, could anything they wanted to in Chicago, without consulti any of the Oklahoma officers, who, in fact, were mere du mies and obedient servants of the Standard.

Executive Committee—Deep Rock.

At the Directors' meeting on June 6, 1919 (Ex. 17 Stipulation), an Executive Committee was established der authority of the Delaware Law, and authorized, dur the intervals between the meetings of the Board of Dir tors "to exercise all the powers of the Board of Direct

in the management and direction of the affairs of the Company, including the power to authorize the seal of the Company to be affixed to all papers which may require it." Vacanies in the Executive Committee were to be filled by the Directors and a majority of the Committee should constitute a quorum.

Section 9 of the General Corporation Laws of the State of Delaware, approved March 10, 1899, empowers the Board of Directors, by resolution passed by a majority of the whole Board, to "designate one or more committees, each committee to consist of two or more of the directors of the corporation, which to the extent provided in said resolution or resolutions or in the by-laws of the corporation, shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation, and may have power to authorize the seal of the corporation to be affixed to all papers which may require it."

An examination of Exhibit No. 17 to the "Stipulation" shows that from May 4, 1921, to 1933, inclusive, the Deep Rock's Executive Committee was composed exclusively of Standard's Directors and Officers, with the exception of George N. Moore, during the years 1921 and 1922, and J. L. Gray for the years 1925 to 1933, and L. B. Riddle and W. R. Francisco for the years 1926 to 1933, inclusive.

The Executive Committee was first composed of four members, but on May 4, 1921, it was increased to six members by adding George N. Moore and H. C. Cummins, the latter being a Standard man. In 1922 the Executive Committee was increased to seven by adding A. S. Huey, a Standard man. When Riddle and Francisco were added in 1926, the Committee was composed of seven members, four of them being Standard Directors and Officers.

L. B. RIDDLE, one of the Deep Rock's directors sinc March 9, 1925, was employed by the Standard in 192 (Tr. 54) He was employed during the time George Moor was Deep Rock's President, in 1922. (Tr. 54)

JOHN L. GRAY was never President of the Dee Rock, but was executive Vice-President and General Man ager. (Tr. 54) He was a Standard director for the yea 1928. (See Standard's Annual Report for 1928.) Gra was one of the five Refining Company directors fro March 27, 1925, to April 15, 1933. (Exhibit No. 20 to "Stip ulation.")

In April, 1924 (Tr. 114-115), R. J. Graf, Standard' first Vice-President (Exhibit No. 14 to "Stipulation," pag 3) employed John L. Gray to make a survey and repor on the properties of the Deep Rock and its subsidiaries fo a fee of $15,000.00 plus traveling expenses (Tr. 115), whic survey Mr. Gray completed in about 30 or 90 days. (Tr 116) *Standard paid Gray's fee and did not charge it to Dee Rock.* (Tr. 559) John L. Gray was not employed by Dee Rock but by Standard and became what Judge Sanbor would call a Deep Rock *"biddable director"* from Octobe 8, 1924, up to the receivership in February, 1933. Standar was careful to ingratiate *itself first.*

Referring to Claimant's Exhibit 8 (Tr. 115) counsel fo the Trustee asked R. J. Graf (Tr. 116-117) whether or no he conferred with Mr. Byllesby before conferring with Mr Gray in regard to the survey, to which witness replied "Well, I don't remember whether I had conferred with Mr Byllesby personally, but I had conferred with the othe executives of the Standard Gas and Electric Company."

Q. "And in your conversation with Mr. Gray, you wer speaking for the Standard Gas and Electric Company

A. Yes, sir.

Q. Who paid Mr. Gray's fee of $15,000?

A. I don't remember who paid that." (Tr. 117)

Mr. O'Brien testified that "shortly after I became President, we employed Mr. John L. Gray. We first hired Mr. Gray to go down and make a report on the property, tell us what we should do. He made a very good report, and we employed him along in July of 1924." (Tr. 12) Mr. O'Brien also states that the Deep Rock's offices were maintained in Chicago. (Tr. 13) Mr. O'Brien testified that Mr. Gray's salary, to the best of his recollection, was $36,000.00 per annum, and also a certain amount of stock in the event profits were beyond a certain amount, and he thinks he made the contract with Mr. Gray as President of the Standard. (Tr. 31) Mr. O'Brien testified that on the recommendation of Mr. Gray he authorized the employment of L. B. Riddle, who had been purchasing oil engineer with the Pure Oil Company (Tr. 32); that Riddle was put in charge of production as Vice-President; that Riddle's salary was paid by the Deep Rock.

B. W. LYNCH testified (Tr. 306) that R. J. Graf contacted John L. Gray with a view to taking him into the organization and that several names were considered before Mr. Gray was finally selected. Lynch also testified (Tr. 307):

Q. "Who considered Mr. Gray and the other names that were submitted? Was that the Byllesby Engineering and Management Company?

A. The officials of the Byllesby Engineering and Management Corporation.

Q. The Byllesby Engineering and Management Corporation finally decided, the officials did, that Mr. Gray was the best man available, and upon the findings of the officials of the engineering and management corporation, Mr. Gray was selected as vice-president and manager of the Shaffer Oil and Refining Company.

A. Yes, sir."

BERNARD L. MAJEWSKI, Vice-President and Director of Deep Rock (Tr. 72), testified that John L. Gray was an experienced refinery operator of many years' standing (Tr. 91) and regarded by the profession as an expert in that line; also that he had scientific knowledge of how to construct and operate refineries and cracking plants. (Tr. 92) Referring to Gray, Majewski is asked (Tr. 92):

Q. "Now, he (meaning Gray) made a report to the Standard Gas and Electric of his survey of these properties?

A. Yes, sir.

Q. And soon after that report was made to the Standard Gas and Electric he was employed to become connected with the Shaffer Oil and Refining Company?

A. Yes, sir, on October 1, 1924."

Majewski also testified (Tr. 92) that Gray was made executive Vice-President and General Manager and Director; also (Tr. 86) "Our people at Cushing, Oklahoma, together with Mr. Gray, have contributed several notable accessories to the art of cracking."

Majewski also testified that he was connected with C. B. Shaffer and the Deep Rock, as successor to C. B. Shaffer, since September, 1917 (Tr. 73), and has been a Director of the Deep Rock since January 11, 1928 (Tr. 73); that he had been in the marketing department since the organization of the Deep Rock (Tr. 73); that Gray was employed in the latter part of 1923 to make a survey of all the properties (Tr. 91); that Gray was an experienced refinery operator of many years' standing (Tr. 91) and was *regarded by the profession as an expert in that line* and as having scientific knowledge of how to construct refineries and operate them, as well as *construct and operate* cracking plants. (Tr. 92) Also testified that after Gray made his report "to the Standard Gas and Electric" he was employed to become connected with the Deep Rock on October 1, 1924, as Executive

Vice-President and General Manager, and also a Director. (Tr. 92)

(NOTE: Gray's annual salary of $36,000.00 was paid by Deep Rock. (See Kerr's answer to 16th interrogatory.) This question naturally arises in the mind: Why should the Engineering and Management Corporation charge large fees for management services, such as advice, etc., after employing an expert at such a handsome annual salary?)

R. J. GRAF (Standard's Secretary and Treasurer from 1919 to 1923, inclusive—see Knourek's answer to 60th interrogatory—and Standard's Director from 1912 to 1933, inclusive, and its First Vice-President from 1924 to 1932, inclusive, and Engineering and Management Corporation's Vice-President from 1920 to 1923, inclusive, and its First Vice-President from 1924 to 1932, inclusive—see Exhibits 12 and 14 to 'Stipulation") has been connected with the Standard since its organization. (Tr. 106) Previous to the organization of the Standard he was connected with Mr. O'Brien, Mr. Byllesby and others since the incorporation of H. M. Byllesby and Company. (Tr. 106) He was Secretary of H. M. Byllesby & Company. (Tr. 106) He testified that Byllesby Engineering and Management Corporation was organized in 1919 and that he is now and has been connected with that corporation as Director and Vice-President (Tr. 107) and his testimony shows that he has been connected with the Byllesby Engineering and Management Corporation since its organization. He also testified (Tr. 118) that the Directors of the Byllesby Engineering and Management Corporation "were likewise directors of the Standard Gas and Electric Corporation" and that the directors and officers of the Byllesby Engineering and Management Corporation "were selected or rather elected by the Standard Gas and Electric Company." (Tr. 118)

R. J. Graf has been a director of the Deep Rock sinc September, 1919; R. J. Graf was Secretary of the Dee Rock from shortly after its organization until he was su ceeded by W. R. Francisco. (See Trustee's Exhibit ... Tr. 151)

W. R. FRANCISCO. Although this man is efficien nevertheless he has been at all times a dummy or "bidd ble" director and officer of the Deep Rock. He has bee Secretary and Treasurer of the Deep Rock (Tr. 151) sinc 1922 (Exhibit No. 16 to "Stipulation") and a Director Deep Rock since 1923. (Tr. 153) Prior thereto he had bee Assistant Auditor of the Sinclair Refining Company, Ch cago, for about three years, with the Public Service Com mission of the State of Missouri for about three years, an then with Peak, Marivick, Mitchell & Company of St. Loui public accountants, for a short period of six months to year, and prior thereto had been with the Waters-Pierce C Company in St. Louis for about seven years. (Tr. 15 *Mr. B. W. Lynch, Vice-President, Director and Chairm of the Finance Committee of the Standard* (Tr. 272) e *ployed him in a temporary capacity for a three month trial with the Deep Rock, and he thinks his first pay che came from Byllesby and Company.* (Tr. 152) Within month or two after he was employed Mr. Lynch then i formed him (Tr. 152) that his temporary employment h been made permanent.

(NOTE: Once when the Indians captured Dani Boone they took him to the river, "washed all the whi blood out," painted him a reddish color, and th claimed they had made him an Indian. So the Standa made Francisco first a "*Standard man*" and second "Deep Rock man.")

During all these years he had been in the auditing, accoun ing and financial end of the Deep Rock's business and

the Deep Rock's offices at Tulsa since December 1, 1925. Previous to that time, while in the Deep Rock's service, he was located in Chicago. (Tr. 153)

Francisco testified on cross examination that no one connected with the Deep Rock approached him to employ him but that (Tr. 170) "I came over to the office of Standard Gas and Electric Company and applied at the desk, I think to a man named Reedy, and I told him I was looking for a position, and, fortunately, he got my card in to the right person, and that is how I became connected with them. I knew no one in the organization." Mr. Francisco says he thinks his card was sent to Mr. Lynch "because I interviewed Mr. Lynch shortly thereafter." He says Mr. Lynch employed him.

Q. "Who was Mr. Lynch acting for?

A. He employed me as a field auditor for H. M. Byllesby & Company, I think that is who it was, for the Shaffer Oil and Refining Company. I think it was the understanding at that time that that is what I was employed for.

Q. H. M. Byllesby & Company paid your first month's salary?

A. Yes, sir." (Tr. 170)

He testified that thereafter Deep Rock paid his salary and that he received no salary or compensation direct from the Standard. (Tr. 171) He was the Deep Rock's Secretary "from sometime about 1923 on" down to the receivership, and was also Treasurer and Director and thinks he was elected director in 1923. (Tr. 171)

Francisco testified (Tr. 171), and there is no evidence to the contrary, that the meetings of the Deep Rock's Board of Directors were held in the offices of the Standard or in the Deep Rock's offices in Chicago and that none were held in Tulsa, Oklahoma; also testified that the minute books

of the Deep Rock's Directors' meetings were kept in Chicago (Tr. 186) and that occasionally checks were drawn in Chicago on the Deep Rock's bank account, of which checks he would be notified, and that the parties in Chicago authorized to sign checks on Deep Rock's bank account, he thinks, were Mr. Lynch, Mr. Pohl and Mr. Graf, and that Mr. Pohl was an employee of the Standard. (Tr. 173)

That he was a dummy director of the Deep Rock is clear from his own testimony. He did not remember the year in which the negotiations were had for the purchase of the Bradstreet properties, although they were undoubtedly purchased for theDeep Rock. Although in fact he was on Deep Rock's Board of Directors continuously since December 26, 1922 (Exhibit No. 15 to "Stipulation"), he now merely *thinks* he was on the Deep Rock's Board at the time the Bradstreet properties were purchased. (Tr. 194) He understood that Mr. Riddle, in charge of the Deep Rock's purchasing department (Tr. 192), in connection with J. Elmer Thomas, Deep Rock employee, recommended the purchase of the Bradstreet properties. He says the contract for the purchase of the Bradstreet properties was made in the name of J. C. Kennedy, *Trustee, but he doesn't know for whom Kennedy was acting as Trustee* (Tr. 194), *never did know, and does not now know,* although he remembers that the Bradstreet properties were purchased at an approximate cost of $650,000.00, $500,000.00 in cash and $150,000.00 in notes of the Deep Rock, three notes for $50,000.00 each. (Tr. 194-195) He remembers the notes bore interest and were paid by the Deep Rock but doesn't remember how long the Bradstreet properties were carried in the name of J. C. Kennedy, Trustee, but does remember that the officers of the Deep Rock operated the Bradstreet properties and that the Deep Rock paid the cost of operations and received the proceeds of the sale of the oil and gas produced there-

from. (Tr. 195-196) He also knows that J. C. Kennedy was an employee of the Deep Rock in charge of its pipelines, and that the Deep Rock operated the Bradstreet properties until 1925 *"in identically the same manner as other properties of the company"* (Tr. 197) and that the proceeds from the oil and gas were received and expended in the general account of the Deep Rock in the *same manner* as other properties which belong to the Deep Rock. (Tr. 197) He knows that the Deep Rock expended in the development of the Bradstreet properties between the date of their acquisition in 1923 until transferred by Kennedy to the Refining Company in December, 1923, the sum of $1,033,294.32 net, and that this was charged by the Deep Rock to J. C. Kennedy, Trustee, but doesn't think any interest was charged on the account. He does not know upon whose direction this large sum of money was charged to J. C. Kennedy, Trustee. (Tr. 198) He says he does not think Mr. Riddle had any authority to direct this sum to be charged to J. C. Kennedy, Trustee, but believes that Mr. Cummins, then President of the Deep Rock, had such authority and that Cummins might have given the directions, but has no recollection whatever as to who gave the directions. (Tr. 199) He did not participate in any of the discussions preceding the organization of the Deep Rock Oil and Refining Company in 1923 (Tr. 199) and was not advised prior to its organization that the Deep Rock Oil and Refining Company was going to be organized. (Tr. 199) He imagines that his first information was after the Refining Company was organized. He does not know who owned the stock of the Refining Company (Tr. 200). but thinks the stock of the Refining Company was owned by the Deep Rock. (Tr. 201) He says R. G. Hunt was connected with the Standard or Byllesby Engineering and Management Corporation, and that A. S. Cummins is a brother of Henry Cummins, ex-President of Deep Rock, and was connected with the Standard Gas. (Tr. 202) He

thinks J. H. Briggs is connected with the Standard Gas. (Tr. 202)

As conclusive evidence that Francisco was a mere dummy director and a minion of the Standard, we quote the following from his testimony (Tr. 204-208):

Q. "Now, Mr. Francisco, do you recall the circumstances of the transfer of the Bradstreet properties to the Deep Rock Oil and Refining Company?

A. Yes, I think I do.

Q. What book entries, if any, were made on the books of the Shaffer Oil and Refining Company at or about the time of the transfer of these properties to the Deep Rock Oil and Refining Company?

A. Our records show on October 1, 1925, the Deep Rock Oil Corporation made an entry charging securities owned and crediting J. C. Kennedy, Trustee, in the amonut of $649,999, to record the purchase of 8,325 shares of the capital stock of the Deep Rock Oil and Refining Company from J. C. Kennedy, trustee, purchased as of March 22, 1923.

Q. From J. C. Kennedy, Trustee?

A. Yes, sir.

Q. How many shares?

A. 8,325.

Q. Stock of the Deep Rock Oil and Refining Company?

A. Yes, sir.

Q. I wish you would look at that stock book and see if you can find where any stock was issued.

A. No, sir, there does not seem to be any record of that stock.

Q. You were secretary and treasurer of the company at that time?

A. I believe so.

Q. Was any stock certificate ever delivered to you evidencing the company's ownership of this stock?

A No, sir.

Q. About which you have just testified?

A. No, sir.

Q. Was the acquisition or purchase of this stock ever discussed in a directors' meeting of Shaffer Oil and Refining Company?

A. Not that I recall.

Q. Do you know anything of the circumstances connected with the acquisition of this stock?

A. No, sir.

Q. Do you know why this stock was issued or supposed to have been issued to Shaffer Oil and Refining Company except as reflected on the books?

A. No, sir.

Q. Who made the entry on the books?

A. Mr. Kerr.

Q. Under whose direction? Do you recall, Mr. Francisco, the entry being made?

A. No, sir, I do not recall it, Mr. Martin.

Q. You don't recall, therefore, giving Mr. Kerr any directions with regard to it.

A. I didn't give him any directions.

Q. You didn't give him any directions?

A. No, sir.

Q. Did you receive any directions with regard to this entry?

A. Not that I recall, but we must have received some directions. We probably received them from Mr. Brahney.

Q. From Mr. Brahney?

A. We probably did.

Q. Who is Mr. Brahney.

A. One of the vice-presidents of Standard Gas and Electric.

Q. And was at that time?

A. I don't think he was a vice-president then. I think he was general auditor.

Q. Have you any other entries on the books at or about the time of the title to this Bradstreet property passing to the Oil and Refining Company?

A. This entry I refer to was made on October 1, 1925, an on that same date Standard Gas and Electric wa charged with securities owned and credited on the book of the Deep Rock Oil Corporation in the amount o $649,999 to record the sale of 8,325 shares of capita stock of Deep Rock Oil and Refining Company t Standard Gas and Electric Company, as of Octobe 1, 1925.

Q. Do I understand from that entry, then, that the Stand ard account against Deep Rock was increased by tha amount, that the Standard account against the Shaffe was increased by that amount, by virtue of that entry

A. No, sir, it had no effect on the balance of the Standar Gas and Electric.

Q. You say that did not have the effect of increasing th Shaffer's indebtedness to the Standard?

A. That is correct.

Q. What effect did it have, from an asset and liabilit standpoint?

A. I don't think it had any effect.

Q. If the Shaffer Company had purchased that amount o stock from Standard for a given consideration, and ha not paid for it, there would have been a charge mad against Shaffer for that amount, would there not?

A. The entry was a charge to our securities owned, and credit to J. C. Kennedy, trustee, the original entry.

Q. Was the J. C. Kennedy, trustee, account later tran ferred to Deep Rock Oil and Refining Company?

A. No; transferred to Standard Gas and Electric.

Q. Then the J. C. Kennedy account was affected by tha entry, wasn't it?

A. Yes, sir.

Q. And the Shaffer Oil and Refining Company, on accou of that entry, was indebted to J. C. Kennedy, truste in a lesser amount, by the amount of that entry?

A. Well, the other entry, Mr. Martin, was made on th same date.

Q. So did one offset the other?

A. Well, I am not clear on that. Apparently one did offset the other, Mr. Martin, right on the same date."

Here the witness was shown Trustee's EXHIBIT EYE, being a letter dated December 22, 1925, from B. F. Braheney, General Auditor of the Standard, which is as follows (R. Vol. 2, p. 606):

"December 22, 1925.

Mr. O. O. Kerr, General Auditor,
Shaffer Oil and Refining Company,
Tulsa, Oklahoma.

Dear Sir: Referring to lease rental of $75,000 per month from October 1st to December 31st, per our telegram of December 10th, the procedure will be as follows:

Shaffer Oil and Refining Company on March 22, 1923, *purchased from J. C. Kennedy, Trustee, 8,325 shares no par value* capital stock of the Deep Rock Oil and Refining Company for consideration of $649,999 and *leased* the property of the Deep Rock Oil and Refining Company, and received from these properties the full earnings, paying all expenses and advancing funds for additions and betterments, no other consideration being paid. *No entries had been placed on the books of Shaffer Oil and Refining Company for the purchase of this stock but the investment was advanced by the Standard Gas and Electric Company and has been charged to you in Open Account.*

To record the above transaction it will be necessary for you to make the following entries on your books:

Debit:

Securities owned, 8,325 shares
Deep Rock Oil and Refining
Company Stock $649,999

Credit:

J. C. Kennedy, Trustee..... $649,999

to record *purchase* of Capital Stock of above company:

Debit:

J. C. Kennedy, Trustee.....$649,999

Credit:

Standard Gas and Electric Company..$649,99

to transfer the Open Account to latter Company.

On October 1, 1925, Standard Gas and Electri Company purchases from Shaffer Oil and Refinin Company the Capital Stock of Deep Rock Oil and Re fining Company for the same consideration, or $649,99 and entry should be made on your books·

Debit:

Standard Gas and Electric Company $649,999

Credit:

Securities owned $649,99

to record *sale* of above stock *to Standard* Gas and Ele tric Company.

Shaffer Oil and Refining Company will then leas the property of the Deep Rock Oil and Refining Com pany and will pay therefor rental for 1925 of $225,0 pro-rated over last three months of 1925 and subs quent thereto will pay rental of $600,000 per annum i equal monthly installments and lease to this effect now being drawn by Cummins, Roemer and Flynn.

As the new lease is dated October 1. 1925, and th stock was purchased under that date, Standard Ga and Electric Company will give Shaffer Oil and R fining Company the credits as above and interest this amount will cease on that date so that any entri you have made in October and November allowi Standard Gas and Electric Company credit on Op Account in this amount will be reversed.

As to the division of the rental between your Pr duction and Refinery Departments, this will have to worked out by you. After you have arrived at this

vision of rental charge wish you would advise us, sending details as to basis used. (Italics ours.)

Yours very truly,

BFB:R (Signed) B. F. Braheney,
General Auditor."

Although Francisco was Secretary, Treasurer and Director of the Deep Rock he says Mr. Kerr made the entries on the Deep Rock's books on the authority of Mr. Braheney and not on his authority, although he appears not to have protested against it. (Tr. 208) Although the Deep Rock had paid out on the Bradstreet properties and for the cracking plant and charged to the account of J. C. Kennedy, Trustee, and R. J. Graf, Trustee, $1,894,592.11, Francisco meekly submitted to and acquiesced in the transfer of this account on December 22, 1925, as of October 1, 1925, on the directions of, *not* Deep Rock's Board of Directors, but Braheney, Standard's General Auditor, the effect of which was the manufacture of evidence that the Deep Rock had no interest, right or title in the Bradstreet properties or the cracking plant from and after October 1, 1925. These phony book entries were made as the basis for the unconscionable lease executed in March, 1926, under date of October 1, 1925.

Francisco testified (Tr. 209-210) that the $1,894,592.11 was charged on the books of the Deep Rock against the Standard without any authority from the Deep Rock's Board of Directors. Francisco testified as to the construction of the Dubbs pressure stills Nos. 1 to 4, inclusive, in the Fall of 1922 (Tr. 210) and that the Deep Rock paid the cost thereof, to-wit, $861,297.79 (Tr. 216) which was charged to R. J. Graf, Trustee, but whether such expenditure and charge was authorized by the Deep Rock's Board of Directors he does not know, although he was a member of the Board and secretary and treasurer of the Deep Rock and

actively in charge of its affairs in its office. He assumes th the $861,297.79 cost of the Dubbs pressure stills was charg to R. J. Graf, Trustee, by the direction of Mr. Brahen Standard's General Auditor (Tr. 217), and thinks that Braheney gave the directions to charge the Standard wi the $1,894,592.11, Deep Rock's investment in the Bradstr properties and the cracking plants. (Tr. 217) He reca the leasing of the pressure stills and Bradstreet propert by the Refining Company to the Deep Rock, but does remember whether or not the Deep Rock's Board of rectors authorized taking any such lease. (Tr. 218) T lease (Trustee's Exhibit Jay) was dated October 1, 19 The Refining Company executed it by John L. Gray, Pre dent, and W. R. Francisco, Secretary. The Deep Rock ecuted it by F. C. Gordon, Vice-President, and Herb List, Assistant Secretary. As a matter of fact, according Francisco's own testimony, this lease was not executed til March 20th or 21st, 1926. (Tr. 218-219) In his testimo he assumes it was executed on October 1, 1925, but up showing him Trustee's Exhibit XX a letter dated March 1926, from Mr. Braheney, Standard's General Auditor, dressed to him, he says that the lease was actually execut evidently subsequent to March 19, 1926. (R. Vol. 2, p. The Trustee's Exhibit XX is as follows:

"Byllesby Engineering and Management Corporati
231 S. LaSalle Street, Chicago.

Mr. W. R. Francisco, Treasurer, March 19, 19
Shaffer Oil and Refining Company,
Tulsa, Oklahoma.

Dear Sir: We are enclosing herewith two cop of agreement between Deep Rock Oil and Refining Co pany and Shaffer Oil and Refining Company dated tober 1, 1925, covering lease of property. Please h signatures of Mr. Gray as president and yourself secretary of Deep Rock Oil and Refining Compa

affixed to these agreements, returning the originals to us and keeping the duplicates for your files.

Yours very truly,

B. F. Braheney, General Auditor."

Thus it clearly appears that Mr. Francisco, Secretary and Treasurer of the Deep Rock and Secretary of the Refining Company and a Deep Rock Director, was a mere tool of the Standard, exercised no independent judgment of his own, and would do anything the Standard told him to do without regard as to whether or not it was to the best interest of the Deep Rock.

M. A. MORRISON, a resident of Chicago, was Standard's Assistant Secretary and Treasurer in 1919 to 1923, inclusive, *and from then on* Standard's Secretary and Treasurer down to date. (See Knourek's answer to the 60th interrogatory, and Standard's Annual Reports.) He has been since 1919, and is now, a Director of Standard and also Vice-President and Treasurer of Byllesby Engineering and Management Corporation since the organization of both of said corporations, and previous to that time was connected with H. M. Byllesby and Company. (Tr. 241) He has been a member of the Board of Directors of the Deep Rock since its organization.

B. W. LYNCH was Standard's Assistant Secretary and Treasurer in 1920 and 1921, and its Vice-President in 1922, and ever since, as well as a member of its Board of Directors. (See Knourek's answer to the 60th interrogatory, and Standard's annual reports.) He resides in Chicago and has been connected with the Standard since its organization in 1910; is a member of its Board of Directors, Chairman of the Finance Committee, and Vice-President, also Vice-President and Director of the Byllesby Engineering and Management Corporation (Tr. 272) and previous to that was con-

nected with H. M. Byllesby and Company. (Tr. 273) He has been a member of the Deep Rock's Board of Directors since its organization, and has been in constant touch with the Deep Rock's affairs through Mr. Francisco, Deep Rock's auditor, and Mr. Kerr, assistant auditor.

B. F. BRAHENEY is and has been for a number of years Vice-President of the Byllesby Engineering and Management Corporation and general auditor of the Standard Gas and in charge of the accounting work for the affiliated and subsidiary companies of the Byllesby group. (Tr. 458) He is not an officer or director of the Deep Rock, although as shown by the testimony of Mr. Francisco (Tr. 207-208-217, and Trustee's Exhibit "K," Tr. 219) he gave orders and directions in regard to vital transactions.

J. C. KENNEDY was trustee of the Bradstreet properties. He is not an officer of the Standard nor the Deep Rock, but was a Deep Rock employee in charge of its pipelines. (See Francisco's testimony, Tr. 197.)

R. G. HUNT. Two shares of the Refining Company stock were issued to R. G. Hunt on March 22, 1923. (Tr. 201) He was connected with either the Standard or Byllesby Engineering and Management Corporation. (Tr. 202) In fact, he was a Standard Director from 1921 to 1928, inclusive. (See Knourek's answer to 60th interrogatory, and Exhibit No. 14 to "Stipulation.")

W. E. MOODY. He was with the Consumers Refining Company from 1917. He was asked on original examination this question:

Q. "You joined the Byllesby Company when they bought the property?

A. Yes, sir." (Tr. 496)

He remained continuously in charge of the refinery at Cushing since its purchase from Mr. Shaffer with the excep-

tion of the short period when Mr. Hartery, who died in 1920, was superintendent. While Mr. Hartery was superintendent Moody was assistant superintendent and has remained in actual control of the refinery's operations since Hartery's death. (Tr. 496) He has been a Deep Rock Vice-President since 1923 (Tr. 98-99) in charge of refining and has been a director since in 1928. (Tr. 495-496) According to Trustee's Exhibit "B," first marked Receivers' Exhibit "B," he was the owner on May 3rd, 1934, of 1492 shares of common stock, but he was a mere *dummy Vice-President and Director*, and this is shown by the following facts: Although he was Vice-President of Deep Rock since 1923 (Tr. 98-99) he knew nothing about the terms of the first lease dated October 1st, 1925, nor the amount of rental Deep Rock was obligated to pay under the original or renewal lease except what he saw on the earning statements. On December 20, 1930, the Deep Rock renewed the five-year rental contract shown by Exhibit "A" to Trustee's objections to Standard's claim. This renewal lease is shown by Exhibit "B" to the Trustee's objections to Standard's claim, and as we will hereafter point out, both of said leases were unconscionable and inequitable. He was director at the time the renewal lease was made, which burdened the Deep Rock with a rental liability of $3,075,000.00, PLUS the liability for all depreciation and depletion and obsolescence of the cracking plant and the Bradstreet properties, which entailed on the Deep Rock an actual expenditure between October 1, 1925, and February 28, 1933, of $2,418,904.29. (See Francisco's answer to the 47th interrogatory.) He testifies (Tr. 515) in answer to a question asking him if he was familiar with the general contract under which the pressure stills were operated by the Deep Rock:

"Well, I knew there was a rental paid, but I didn't know the details of it.

Q. You did not know the amount of it, did you?

A. I did from seeing certain earning statements.

Q. Just from what you saw of the earning statements?
A. Yes, sir.
Q. You have no information, then, as to what rental was being paid by the Deep Rock for the use of these stills, except what you saw on the earning statement?
A. That is right.
Q. You were never consulted with reference to the amount of rental to be paid, were you?
A. You mean when the first contract was made?
Q. Yes.
A. No.
Q. Yes. Were you consulted when the second contract was made?
A. No."

By the time Moody was reached as a witness claimant's counsel had themselves become so thoroughly saturated with knowledge that the Deep Rock's Directors were Standard's MARIONETTES that they automatically popped this question (Tr. 496):

"You joined the *Byllesby* Company when they bought the property?
A. Yes, sir."

ARTHUR S. HUEY. Paragraph 9 of Claimant's Exhibit 2, the purchase contract between C. B. Shaffer and H. M. Byllesby and Company of May 20, 1919, provides: "That H. M. Byllesby, Arthur S. Huey, Otto E. Osthoff, and J. J. O'Brien, respectively, are to continue in active service of the Company to be formed, devoting their time and attention to its best interests for such time as C. B. Shaffer shall remain with the Company, as provided in the next succeeding paragraph," etc. Mr. O'Brien testified (Tr. 42-43) that Arthur S. Huey died in August, 1924, and that he was with H. M. Byllesby and Company from the date of its organization until the date of his death. Some time between June 6, 1919, the date of the first meeting of the Board of Directors of the

Deep Rock, and September 8, 1919, Mr. Arthur S. Huey became a member of the Deep Rock's Board of Directors. He was Vice-President and Director of the Standard during the years 1919 to 1923, inclusive. (See Knourek's answer to the 60th interrogatory, and Standard's 1923 Annual Report.)

OTTO E. OSTHOFF. He was a Deep Rock Director in 1920 and 1921 (Exhibit No. 15 to "Stipulation") and a Standard Director from 1920 to 1922, inclusive (Exhibit No. 14 to "Stipulation"). He was chief engineer of Byllesby Engineering and Management Corporatoin in 1922 and 1923 (Tr. 52) and as the Byllesby Engineering and Management Corporation's chief engineer he built "many power houses, pole lines and other work in connection with electricity and gas." (Tr. 58) Osthoff was evidently connected with H. M. Byllesby and Company or the Standard because he joined with H. M. Byllesby, Arthur S. Huey and J. J. O'Brien in a letter under date of May 20, 1919, addressed to C. B. Shaffer, wherein they "personally guarantee that said H. M. Byllesby and Company will, in all respects, carry out the covenants and agreements in said agreement contained (meaning the contract of May 20, 1919, above quoted), and upon the delivery to said Company (meaning the new Company) of proper instruments of conveyance, pay to you the consideration in the manner and form set out in No. 4 of said agreement." This letter of guaranty was attached to the contract of May 20, 1919, and together filed in this case as Claimant's Exhibit No. 2.

HERBERT LIST. He executed the lease of October 1, 1925, as Deep Rock's Assistant Secretary. He is now and has been since 1919 Deep Rock's Assistant Secretary and Assistant Treasurer, in Deep Rock's Chicago office. (See Exhibit No. 16 to "Stipulation.") He was also Assistant Secretary and Assistant Treasurer of the Standard in 1919, and every year thereafter including 1932. (See Knourek's

answer to 60th interrogatory and Exhibit No. 14 to Stipulation.) He was an Engineering and Management Corporation director and Secretary in 1919, and Assistant Treasurer and Assistant Secretary from 1922 to 1933, inclusive. (See Exhibit No. 12 to "Stipulation.") It should be noted that he executed some of Deep Rock's notes to Standard, shown by Exhibit "B" to Knourek's answers to interrogatories. For instance, he executed the note of October 1, 1925, for $400,000.00, and the note of December 1, 1924, for $350,000.00 (Exhibits 5 and 6 to Francisco's answers to the 22nd and 23rd interrogatories); also Deep Rock's note of November 23, 1925, for $100,000.00; Deep Rock's note of February 23, 1926, for $100,000.00; Deep Rock's note of November 22, 1926, for $100,000.00. *And especially worthy of note is the fact that he executed for the Deep Rock its note of $4,250,000.00, dated December 31, 1926, to Standard.* He also executed Deep Rock's note of February 21, 1927, for $100,000.00 to Standard; also Deep Rock's note of May 23, 1927, to Standard, for $100,000.00; Deep Rock's note of August 22, 1927, for $100,000.00; Deep Rock's note of November 21, 1927, for $100,000.00; Deep Rock's note of February 20, 1928, for $100,000.00; Deep Rock's note of May 21, 1928 for $100,000.00; Deep Rock's note of August 20, 1928, for $100,000.00; Deep Rock's note of November 19, 1928, for $100,000.00; Deep Rock's note of May 20, 1929, for $100,000.00, and another one on the same date for $100,000.00; Deep Rock's note of August 19, 1929, for $100,000.00; Deep Rock's note of November 18, 1929, for $100,000.00, Deep Rock's note of February 17, 1930, for $100,000.00, and some of the notes he did not execute for the Deep Rock he endorsed, as shown by Exhibit "B" to Knourek's interrogatories.

List's own testimony (Tr. 581) shows that he was a mere tool of the Standard, had no independent judgment of his own, and executed papers, contracts and notes for the Deep Rock without any authority from the Board of Direc-

tors but upon the direction of Standard's officers. He has no recollection of having attested the October 1, 1925 lease as Deep Rock's assistant secretary. He does not recall anything about that transaction; does not know at whose direction he attested the lease; does not recall whether John L. Gray, President of the Deep Rock Oil and Refining Company, had executed the lease on behalf of the Refining Company before or after it was executed by the Deep Rock. He identified his signature to the Deep Rock's $4,250,000.00 note dated December 31, 1926, but has no recollection of the transaction. He does not know what the consideration for the note was nor what was done with the $4,250,000.00; does not know whether the Standard paid the Deep Rock the $4,250,000.00; does not remember that he ever k[illegible]ew; does not remember at whose direction or by whose authority he signed the Deep Rock's name to the $4,250,000.00 note. He identifies his signature to the photostatic copy of the Deep Rock's $400,000.00 note dated October 1, 1925, payable to Standard, but has no recollection of the transaction. He does not remember at whose direction he executed the $400,000.00 note on behalf of the Deep Rock; does not know what became of the $400,000.00; does not know whether the Standard paid the Deep Rock the $400,000.00 or gave Deep Rock credit on open account for that sum; does not have any recollection about the $100,000.00 notes executed by him on behalf of the Deep Rock; does not know the consideration for the notes; does not recall whether the Deep Rock received the money or credit on open account for the notes; cannot recall who directed or authorized him to sign the Deep Rock's name to the notes, but does remember that all the notes he executed for the Deep Rock *were executed in Chicago.* He says Mr. Morrison was his superior officer at that time but he cannot say whether or not he executed the notes for the Deep Rock at the request of Mr. Morrison, but says that if Mr. Morrison had requested him to execute the notes he

guesses he would have executed them. He testified that Mr. O'Brien had requested him to execute those notes behalf of the Deep Rock he would have executed them, al if Mr. R. J. Graf had requested him to execute those not on behalf of the Deep Rock he *sure would* have execut them; also if B. W. Lynch had requested him to exec notes for the Deep Rock he would have executed them. *Wh asked if any officer of the Standard had requested him execute the notes for the Deep Rock if he would have exec ed them, he answered "Absolutely."* He never drew a salary from the Deep Rock nor the Standard, but his sala was paid by the Byllesby Engineering and Management Co poration which, of course, is the same thing as if the Stan ard had paid his salary.

In the language of Mr. Justice CLARKE, in *United Sta* v. *Reading Co.*, 253 U. S. 26, 64 L. ed. 760, 780, "Where su ownership of stock is resorted to, not for the purpose of pa ticipating in the affairs of the corporation in which it is he in a *manner normal and usual* with stockholders, but for t purpose of making it a mere agent, or instrumentality, department of another company, the courts will look throu the forms to the realities of the relation between the co panies as if the corporate agency did not exist, and will de with them as the justice of the case may require."

Not only did List execute on behalf of the Deep Ro the lease and the various notes and checks, but also in 19 as shown by Exhibit 3 to Francisco's answer to interro tory No. 13, List executed on behalf of the Deep Rock June 3, 1932, check for $100,000.00 pa able to H. M. B lesby and Company, and sixteen other checks on behalf the Deep Rock payable to H. M. Byllesby and Compa for services in obtaining an extension of over $7,000,000 of the Deep Rock's $10,000,000.00 in notes maturing Ma 1, 1933.

Not only did List sign on behalf of the Deep Rock

seventeen checks payable to H. M. Byllesby and Company, shown by Exhibit 3 to Francisco's answer to the 13th interrogatory, but he also signed six checks payable to Standard and countersigned three checks payable to Standard, as shown by Exhibit 11 to Francisco's answer to the 40th interrogatory. As shown by Exhibit 12 to Francisco's answer to the 40th interrogatory these checks were drawn in Chicago and written notice thereof mailed out of Chicago to the Deep Rock's Tulsa office. These notices were sent by Byllesby Engineering and Management Corporation.

(NOTE: It was here agreed (R. Vol. 2, p. 151) that Mr. J. J. Madden and Mr. E. J. McKay would testify to a course of conduct exactly like List pursued as an officer of the Deep Rock and Standard and Byllesby Engineering and Management Corporation.)

There was no resolution of the Board of Directors authorizing anyone to execute the $4,250,000.00 note of December 31, 1926, to Standard, or any of the other notes set forth in Exhibit "B" to Knourek's answer to interrogatories.

It will also be noticed that E. J. McKay, on Deep Rock's stationery, address "231 South LaSalle Street, Chicago, Illinois," April 30, 1932, executed on behalf of the Deep Rock the contract with H. M. Byllesby and Company employing the latter company to obtain an extension of the Deep Rock's $10,000,000.00 note issue maturing March 1, 1933.

This and other admitted facts and circumstances conclusively show, as we will point out under the authorities cited on page 207 of this abstract and brief, that the Refining Company was a mere instrumentality of the Deep Rock and that the Deep Rock was a mere department of the Standard.

It was not the Deep Rock seeking an extension of its $10,000,000.00 in notes. It was the Standard that wanted

and promoted the extension. These checks signed by Li and some signed by Morrison and countersigned by Li payable to H. M. Byllesby and Company, were executed a evidently delivered in Chicago. Exhibit 4 to Francisc answer to the 13th interrogatory contains copies of noti forwarded from Chicago to the Deep Rock Oil Corporati at Tulsa advising the Deep Rock that certain checks h been drawn on its account payable to H. M. Byllesby a Company. These notices were *not sent by Deep Rock's* C cago officers but by Byllesby Engineering and Managem Corporation.

(NOTE: These notices and statements sent De Rock's Tulsa office by the Engineering and Mana ment Corporation (shown by Exhibits 4 and 12 to Fr cisco's answers to interrogatories) are a part of t management services for which the Standard is n suing. *Why the intervention of the Engineering a Management Corporation in this matter?* The De Rock's contract with H. M. Byllesby and Company, April 30, 1932, employing it to obtain an extensi of the $10,000,000.00 in notes, was executed on beh of the Deep Rock by E. J. McKay, as Vice-Preside who in turn was also Standard's Vice-President at t same time. (See page 7, Exhibit No. 14 to the "Stip lation.") The letter of May 5, 1932, transmitting copy of the contract to Francisco at Tulsa was sign by J. J. Madden, Assistant Secretary of the Engine ing and Management Corporation, and written on t Engineering and Management Corporation's stati ery. (See Exhibits 1 and 2 to Francisco's answers interrogatories.) J. J. Madden was also at the sa time Deep Rock's Assistant Secretary. (See page of Exhibit No. 16 to the "Stipulation.") J. J. Madd was also Standard's Assistant Secretary and Treas er. (See page 7 of Exhibit No. 14 to "Stipulation. If McKay and Madden, Deep Rock's Chicago office had authority to employ H. M. Byllesby and Compa to obtain an extension of the notes, then they had thority to attend to the matter as Deep Rock's office

and as such Deep Rock's officers notify the Tulsa office. But the set-up was this: *(a)* Standard's officers, acting in the name of Deep Rock, employed H. M. Byllesby and Company to obtain an extension; *(b)* the Engineering and Management Corporation then stepped in to oversee the work of H. M. Byllesby and Company, for which it, the Engineering and Management Corporation, charged fees; and *(c)* the Standard, by crediting the Engineering and Management Corporation for annual employment fees, built up for itself a book account against the Deep Rock for management services, wholly unnecessary, and for which the Standard never paid a dollar. Standard now proposes to collect from the Deep Rock large engineering and management fees as the assignee of a fictitious account of the Engineering and Management Corporation against Deep Rock. Between these corporate *pirates*, what chance had Deep Rock and its preferred stockholders and creditors?)

PAUL A. LEHMKUHL. As Deep Rock's Assistant Treasurer he executed for the Deep Rock on August 28, 1924, a note for $100,000.00 payable to Standard, a renewal of the note to Standard on November 26, 1924, and another renewal February 24, 1925. (See Exhibit "B" to Knourek's answer to the 31st interrogatory.) He was another Deep Rock dummy. He was Deep Rock's assistant secretary in 1919, and assistant secretary and assistant treasurer from 1920 to 1934, inclusive. (See Exhibit No. 16 to Stipulation of Facts.) At the same time he was Byllesby Engineering and Management Corporation's Assistant Secretary in 1919, and assistant treasurer and assistant secretary from 1929 to 1933, inclusive. (See Exhibit No. 12 to Stipulation of Facts.) He was Standard's assistant secretary and assistant treasurer from 1919 to 1922 (see Knourek's answer to the 60th interrogatory) and assistant secretary and treasurer from 1923 to 1932, inclusive. (See Exhibit No. 14 to Stipulation of Facts; also Tr. 569.) He does not remember the note he executed on behalf of the Deep Rock on August 28,

1924, to Standard, for $100,000.00, nor the note of Nover 26, 1924, to Standard for $100,000.00, but said he sig those in the absence of the secretary. He thinks Mr. F cisco was secretary but can not recall offhand. When a at whose direction he signed either of the notes he sta "I signed those in the absence of my superior, Mr. M son." He does not remember who told him to sign the n but says they were signed in Chicago. When asked if Morrison asked him to sign the Deep Rock's name to notes, he answered, "I would say yes, although I don't remember that he did, but I would not have done it wit his authority." (Tr. 571) He does not think Mr. Cumm directed him to execute the notes, does not know what done with the money the notes represented, and does recall whether or not he was consulted about the advisib of executing the notes. *His salary as assistant treas of the Deep Rock was paid by Byllesby Engineering Management Corporation.* He did not receive any sa from either the Standard or the Deep Rock. He also dorsed the Deep Rock's notes to Standard, dated Febru 18, 1929, August 19, 1929, November 18, 1929, and Febru 17, 1930, as assistant secretary. (See Exhibit "B" to K rek's answer to interrogatories.)

WILLIAM GEORGE POHL. He was another D Rock dummy. He was a Deep Rock director in 1931 Deep Rock's assistant secretary and assistant treas from 1926 to 1934, inclusive. (Exhibit 16 to "Stipulatio He was a director of the Engineering and Management C poration from 1930 to 1933, inclusive, and its assistant retary and assistant treasurer from 1922 to 1933, inclus (See Exhibit No. 12 to "Stipulation.") He was also a di tor of Standard in 1923 and 1933, and assistant secret and assistant treasurer of Standard from 1923 to 1932 clusive. (See Exhibit No. 14 to "Stipulation.") He

director of H. M. Byllesby and Company in 1931 and 1933. (See Exhibit No. 13 to "Stipulation of Facts.") As Standard's assistant secretary he endorsed the Deep Rock's note of March 1, 1924, to Standard; also Deep Rock's note of August 28, 1924, to Standard, and also endorsed the Deep Rock's notes of November 26, 1924, and August 24, 1925, to Standard; also endorsed the Deep Rock's note of November 23, 1925, to Standard, Deep Rock's note of February 23, 1926, to Standard, Deep Rock's note of February 21, 1927, to Standard, Deep Rock's note of February 20, 1928, to Standard, Deep Rock's note of May 21, 1928, to Standard, Deep Rock's note of August 20, 1928, to Standard, Deep Rock's note of November 19, 1928, to Standard, and Deep Rock's note of May 20, 1929, to Standard. He also signed Deep Rock's note of August 23, 1926, to Standard, as assistant treasurer, and countersigned Deep Rock's note of May 22, 1927, to Standard, as assistant secretary. (See Exhibit "B" to answer of Mr. Knourek to the 31th interrogatory.)

(NOTE: It was just one happy family.)

He cannot recall anything about these transactions—the execution of the notes, countersigning them, and endorsing them. He did not receive any salary from the Deep Rock or the Standard. (Tr. 577) He thinks his salary was paid by Byllesby Engineering and Management Corporation. (Tr. 578) He executed the notes and countersigned them in Chicago, but does not know on whose authority he signed the notes or countersigned them. He cannot remember whether they were for borrowed money or credit on open account but thinks he knew at the time they were executed. He would have to make a search to find any contract or resolution of the Board of Directors of the Deep Rock directing him or authorizing him to cointersign any of the notes. He says Mr. Morrison was Standard's secretary and was his superior and he took orders from Mr. Morrison.

Point One.

The item of $4,525,000.00 charged by Standard against Deep Rock as rental under the lease of the cracking plant, the Bradstreet and other properties under date of October 1, 1925, shown by Exhibit "A" to Trustee's objections, and the renewal lease under date of October 1, 1930, shown by Exhibit "B" to Trustee's objections, should be adjudged fraudulent and void and the item in Standard's account of $4,819,222.07 designated as "interest on open account balances" should be purged of the 7 per cent monthly interest calculated on the items composing the rentals.

Both the Bradstreet properties, standing in the name of J. C. Kennedy, Trustee, and the cracking plant, standing in the name of R. J. Graf, Trustee, belonged to the Refining Company at all times, and Kennedy and Graf were mere naked trustees for it.

First:

All the stock of the Refining Company ever issued (9,000 shares) belonged to Deep Rock at all times. Kennedy, Morrison, Graf, et al., in whose name the stock was issued were holding it as trustees for Deep Rock.

(a) In *John L. Gray and L. B. Riddle, Plaintiffs,* v. *Deep Rock Oil Corporation, Defendant,* No. 844 Equity, in the United States District Court for the Northern District of Oklahoma, the Standard intervened and filed its claim for an alleged balance on open account against the Deep Rock in the sum of $9,342,642.37, being the same claim now filed against the Trustee in Bankruptcy. The receivers in the aforesaid federal equity case on November 28, 1933, filed their answer and counterclaim to the intervention and claim of the Standard, to which answer and counterclaim the Standard, on December 28, 1933, filed its answer and reply. The Standard's answer and reply admits that the Brad-

street properties were acquired and the cracking plant constructed for the Deep Rock. In the 2nd paragraph of Section 2 of the Standard's answer and reply, it is said:

> "And it specifically denies that anything connected with the purchase of the L. G. Bradstreet properties was for the benefit of Standard Gas and Electric Company in any way, save and except as it was interested in the success of Deep Rock Oil Corporation, and denies that it had or took any profits out of the said transaction, save and except those admitted and shown in its intervention herein." (R. Vol. 2, p. 293.)

In the 6th paragraph of Section 2 of the Standard's answer and reply in the Federal equity case, the Standard said:

> *"It further alleges that the capital stock of said Deep Rock Oil & Refining Company, with the exception of qualifying shares, was issued to Deep Rock, thereby creating it the beneficial owner of all of the properties of said corporation, and that Deep Rock thereafter, in order to relieve its said property of the debt created in favor of Standard Gas and Electric Company by the advance by it of the purchase price of said oil properties and the cost of erecting said cracking plant, transferred to this intervener the said capital stock."* (R. Vol. 2, p. 294.)

Accepting the Standard's admissions in its answer and reply in the Federal equity case, *supra*, every reasonable mind is at a loss to understand why the Deep Rock would consent, otherwise than at the command of the Standard, to a transfer of the Refining Company's capital stock to the Standard "to relieve its said property of the debt created in favor of Standard Gas and Electric Company by the advance by it of the purchase price of said oil properties and the cost of erecting said cracking plant," and in addition thereto burden itself with the unconscionable lease requir-

ing it to pay flat rentals over a period of five years aggregating $3,075,000.00, and at the end of the lease restore the properties to the Refining Company in a condition as valuable as of the date of the lease—in other words, sustain depletion and depreciation and make all replacements necessary to do so. The facts and circumstances lead to the inevitable conclusion that the lease dated October 1, 1925, and the renewal dated October 1, 1930, were Standard babies. They were means by which Standard could absorb Deep Rock's income from all sources (not merely the cracking plant and Bradstreet properties) without dividing it with other Deep Rock stockholders and at the same time augment its (Standard's) assets to the value of the Refining Company's 9,000 shares of stock, which (strangely enough) it did not claim in its annual reports prior to its 1929 report. (R. Vol. 2, pp. 594 to 601)

In December, 1925, "as of October 1, 1925," Standard credited Deep Rock with $1,894,592.11, same being composed of two sums, as follows:

(a) Amount expended by Deep Rock in development of the Bradstreet properties prior to October 1, 1925..... $ 1,033,294

(b) The amount Deep Rock expended in the construction, etc., of the cracking plant..... 861,297

(Tr. 197-198, and Francisco's answer to 47th interrogatory.)

Concurrently with this December 1925 Standard book entry credit to Deep Rock, it (Standard) charged the $1,894,592.11 on open account against the Refining Company and later took the Refining Company's interest bearing note for the same amount. (See Knourek's answers to the 50th, 51st and 52nd interrogatories and Tr. 563, 596, 597, etc., and Kerr's answer to the 24th interrogatory and Exhibit

thereto.) Standard's investment in the 9000 shares of the Refining Company stock was only $649,999.00, the cost of the original Bradstreet properties.

B. W. Lynch, Standard's Vice-President, Director and Chairman of its *Finance Committee* (Tr. 272), testified (Tr. 319 to 321) in regard to the lease: "That was the first time that the Standard Gas or Byllesby Engineering had made such a contract."

Q. "Whose idea was it to rent these wells at a fixed monthly rental?

A. Just a combination of the thoughts of all, so as to give the proper return, and possibility of refunding the money advanced by the Standard, as we would sit in this room here now, and figure out some way we must raise this money, if we need it badly and so forth. Suggestions would come from one to the other as to the best type of contract. The Standard directors naturally are in the same position as a bank would be in lending money. We go down to the banker, and he has the same conditions, of course, on that. There was no mystery about it at all or anything like that. It was just an open proposition, that we have the stockholders of Standard Gas and Electric Company, the public, there has to be an investment that we could justify for them. * * *

Q. Now, you say that the Standard approached this subject just the same as a bank would if the bank were making a loan, and wanted to get its money back?

A. Yes.

Q. And Standard wanted to devise some way to get its money back, is that right?

A. Well, the Standard didn't want to devise it. It was buying a security which the officials of the Deep Rock were willing to sell on that basis. Using the word 'devise,' it was just simply the form of contract.

Q. (Mr. Ramsey:) When the Standard got back its money out of this monthly rental charges, then what did the Standard propose to do?

A. With respect to what, Mr. Ramsey?

Q. Deep Rock Oil and Refining Company's properties

A. Well, it was subject to the contract between the parties, as to the interest of each, they had thei spective positions."

(NOTE: This testimony indicates that the lease devised by Standard as a means whereby it could c its debts against Deep Rock without the necessit crediting Deep Rock with the amounts received as ments on account. The Standard manipulated the fining Company under a policy of "Here you see it now you don't," or "It is mine or it is yours," a exigencies may demand. In this connection Mr. Ly testimony is amusing. When asked (Tr. 317) if he ever heard of "renting oil wells to an oil company certain stipulated rental" he said he got the impre from Mr. Shaffer there was no ethics in the oil ness, and "swore by the point of his knife" tha have been one of those individuals who believed in ing to go in syndicates for oil, and I have been i *type of deal time and time again where it would most impossible, sometimes, to identify the owne or where it was.* I never saw such a complex de back and forth in leases owned by individuals, a *suppose it would apply to corporations*, in the way would operate, *particularly as in the case of this where it was hard to get money by the corpor which needed it.*" This was an inadvertent admis of the truth that if the Standard needed money it owned the Refining Company; if the Deep Rock n ed to borrow $10,000,000.00, then it owned the R ing Company. (See Prospectus, Exhibit No. 1 to "S ulation.") This method would put the creditors of corporations in a "*game of hide and seek.*")

(b) Bradstreet Properties.

Although Receiver's Exhibit "H" (R. Vol. 2, p. shows the Bradstreet properties were apparently acqu

under a contract entered into on February 15, 1923, between Bradstreet Oil Company and J. C. Kennedy, Trustee, the undoubted fact is that these properties were acquired and purchased by the Deep Rock for itself and taken in the name of J. C. Kennedy, Trustee. Kennedy was neither an officer of the Standard nor the Deep Rock, but was a Deep Rock employee in charge of its pipe lines. (Tr. 197) The Deep Rock issued its three $50,000.00 notes as a part of the $650,000.00 consideration paid for the Bradstreet properties. (See Francisco's testimony, Tr. 194, 195, and 221.) The other $500,000.00 of the consideration was paid to the Bradstreet Oil Company by the Standard's checks shown by Exhibit "A" to Knourek's answers to interrogatories. The Standard then credited Deep Rock's open account with the three $50,000.00 notes and charged the whole consideration of $650,000.00 to J. C. Kennedy, Trustee. (See Knourek''s answer to the 13th interrogatory.) This was not a transaction by which Standard could claim a resulting trust in the Bradstreet properties on the ground that it furnished the money for their purchase. As a matter of fact the Standard loaned this money to the Deep Rock, and this is conclusively shown by Knourek's answer to the 64th interrogatory, and his testimony in regard thereto. It appears from Knourek's answer to the 64th interrogatory that *(a)* in March, 1924, the Standard charged the Deep Rock with the sum of $49,057.49 as "interest on J. C. Kennedy, Trustee, account to 3/24/24 transferred to Shaffer Oil and Refining Company," *(b)* in April, 1924, it charged the Deep Rock with $3,911.44 as "interest on J. C. Kennedy, Trustee, account 3/24/24 to 4/24/24," and *(c)* on the last day of each month thereafter during the year 1924 and the last day of each month during the year 1925, up to and including December, it also charged Deep Rock "interest on J. C. Kennedy, Trustee, account," and then in Decem-

ber, 1925, reversed the October, November and Decembe interest charges totaling $10,471.22.

In the 39th interrogatory to Francisco we asked him t state "What interest, if any, appeared on the Deep Rock' books prior to the recitation" contained in Braheney's le ter of December 22, 1925, addressed to O. O. Kerr, Dee Rock's General Auditor (Trustee's Exhibit "Eye") "in re gard to $649,999," original cost of the Bradstreet properties to which interrogatory Francisco answered that "The inter est appearing on Deep Rock's books prior to the receipt o letter of December 22, 1925, was $125,845.45." This is con clusive evidence that the Standard and the Deep Rock treat ed the relation between them as that of debtor and creditor with respect to the $650,000.00, original cost of the Brad street properties.

Knourek positively testified (Tr. 614) that these inter est charges were "on the $650,000.00 advanced by the Stand ard for the purchase of the Bradstreet properties." He tes tifies that the rate of interest was 7 per cent per annum an that the interest was "on the total advanced to J. C. Ken nedy, Trustee."

Knourek then testifies (Tr. 615-616) that following th interest charges made during the months of October and No vember to the Deep Rock on J. C. Kennedy, Trustee ac count, there was an adjustment made by "giving credit t Shaffer Oil and Refining Company, cancelling interes charged to them subsequent to October 1, 1925."

This conclusively shows that the money advanced, to wit, $500,000.00 by Standard to Bradstreet Oil Company i February and March, 1923, and subsequently crediting Dee Rock with $150,000.00 covered by Deep Rock's notes t Bradstreet, was nothing more nor less than a loaning o money, *which created the relationship of debtor and creditor between Deep Rock and the Standard.*

(NOTE: In determining the ownership of the Bradstreet properties *four* things should be borne constantly in mind, to-wit:

(1st) Standard's admissions in the 2nd and 6th paragraphs of Section 2 of its answer and reply to the Receiver's answer and counterclaim in the Federal Receivership case (R. Vol. 2, pp. 293-294) wherein it *(a)* denied "that anything connected with the purchase of the L. G. Bradstreet properties was for the benefit of Standard" except "as it was interested in the success of the Deep Rock," *(b)* alleged that the capital stock of said Refining Company, "with the exception of qualifying shares, was issued to Deep Rock, thereby creating it the beneficial owner of all the properties of said corporation," and *(c)* alleged "Deep Rock thereafter, in order to relieve its *said property* of the *debt* created in favor of Standard by the *advance* by it (meaning Standard) of the purchase price of *said oil properties* and the cost of erecting said cracking plant," etc. This is an express and unequivocal admission that Standard's checks payable to Bradstreet Oil Company (shown by Exhibit "A" to Knourek's answers to interrogatories) constituted a loan to Deep Rock and created the relation of debtor and creditor between Deep Rock and Standard.

(2d) That Standard, although it charged on its books the cost of the Bradstreet properties to Kennedy, Trustee, charged Deep Rock with seven per cent annual interest on the $650,000.00, cost of the Bradstreet properties, thus by its *acts* admitted the money was loaned by it to Deep Rock and that Kennedy was Trustee for Deep Rock and not Standard. (Tr. 614)

(3rd) That Deep Rock exchanged the Bradstreet properties for 9000 shares of the Refining Company stock as shown by the resolutions of the Refining Company's Board of Directors on March 22, 1923. (R. Vol. 2, p. 362) When the Refining Company's 9000 shares of stock were issued on March 22, 1923, to Kennedy, Trustee, he held said stock in trust for Deep Rock.

(4th) That the Statement of B. F. Braheney

(Standard's General Auditor) in his letter of December 22, 1925, addressed to O. O. Kerr, Deep Rock's General Auditor (R. Vol. 2, p. 606), that Deep Rock "on March 22nd, 1923, purchased from J. C. Kennedy, Trustee, 8325 shares of no par value capital stock of Deep Rock Oil and Refining Company for a consideration of 649,999.00," is untrue to the amount of 675 shares as it does not appear anywhere that anyone ever paid Deep Rock or Kennedy, Trustee, anything for the 675 shares, being the difference between the 9000 and 8325 shares.)

B. W. Lynch, a member of Standard's Board of Directors, Vice-President and Chairman of its Finance Committee, as well as Vice-President and Director of Engineering and Management Corporation (Tr. 272) and one of Deep Rock's "biddable" directors, testified (Tr. 313-314) that he recalled the financial transactions involved in the acquisition of the Bradstreet properties; that it was discussed by the operating officials of the Deep Rock or of the Engineering and Management Corporation and "*was considered advisable for the expansion and operation of the Deep Rock.*"

Q. "They were acquired, then, for the benefit of Shaffer Oil and Refining Company? (Meaning Deep Rock.)

A. They were acquired not directly for Shaffer Oil and Refinding Company, but to be considered as a part of its operations." (Tr. 314)

Refining company organized for fraudulent purpose.

The Refining Company was organized under the Delaware laws on February 26, 1923, nine days after the execution of the written contract between Bradstreet Oil Company and Kennedy, Trustee, and it is clear that the Refining Company was organized as an adjunct to and department of the Deep Rock and the title to the Bradstreet properties taken in the name of J. C. Kennedy, Trustee, for the *purpose* of avoiding the lien of the First Mortgage executed by the

Deep Rock to the Continental and Commercial Trust and Savings Bank and William P. Kopf, co-trustees, on June 1, 1919, to secure the authorized issue of $15,000,000.00 First Mortgage 6 per cent Bonds, and that is the reason why the 9,000 issued shares of the Refining Company were not issued direct to the Deep Rock, but issued first to Kennedy, Morrison and others.

Section 53, of the First Mortgage Deed of Trust as alleged by Trustee (R. Vol. 1, p. 113, and not denied by Standard (R. Vol. 1, p. 143)) provides that "All other property of whatsoever kind, character or description, real, personal and mixed, wherever located, now belonging to or which may be hereafter in any way acquired, owned or possessed by the Company," etc., shall be security for the payment of said First Mortgage Bonds, and there is no doubt that the title to the Bradstreet properties was put in the name of J. C. Kennedy, Trustee, in order to secrete the assets of the Deep Rock chargeable with the lien of the First Mortgage.

H. C. Cummins, connected with Standard since its organization (Tr. 135) and a Standard Director and Deep Rock's President from 1922 to June, 1924 (Tr. 147), clearly shows that the Bradstreet properties were acquired by the Deep Rock to meet its *necessities* and that the title was carried in the name of Kennedy, Trustee, to avoid the lien of the First Mortgage. Cummins, in elaborating on the conference had with officers of the Standard and the Byllesby Engineering and Management Corporation in an effort to support the Standard's claim for *management charges* paid to the Byllesby Engineering and Management Corporation, testified (Tr. 140), "Well, we needed money very badly. We were on a period where we had to expand, the company had to close mortgages, its earnings were not good, it had to go ahead, it couldn't stand still. To go ahead meant money."

Q. "What arrangements did the company make to get money, from what source did it get it?

A. Entirely from the Standard Gas and Electric Company, practically entirely." (Tr. 140)

Cummins testified that after he succeeded Mr. Moore as President, or shortly before he came in, "we had secured an appropriation of $50,000 a month for leasing purposes," from the Standard (Tr. 140-141) and that "the money actually was supplied by the Standard Gas and Electric Company." In regard to this monthly allowance of $50,000.00 he was asked:

Q. "Was that amount of money expended under your direction in extending the production of the company?

A. Yes, sir, leases and production.

Q. State whether or not you ever exceeded the allotment of $50,000 a month.

A. Yes, we did for particular instances. For example, the Bradstreet properties were purchased during my time. That, of course, did not come under any fifty thousand dollars a month. This fifty thousand was just for normal acreage production, and occasionally a well that had to be drilled, to secure a new lease, or something of that kind.

Q. The Bradstreet property was purchased about 1923, I believe?

A. That is my recollection.

Q. Do you recall the circumstances of that purchase?

A. Yes, sir.

Q. I wish you would tell what you recall of it.

A. Well, the circumstances were these: As I say, in 1922, and even before I went in in 1922, the most determined effort had been made by Mr. Moore to increase production; I do not mean that the Shaffers had not tried, but when Moore went in, and afterwards, there was a most determined effort made to increase production. Practically *every lease* at the time George Moore went in as president *that was drillable had been drilled* under the direction of Mr. Dale Shaffer. We had to start out *literally to get acreage on which additional drilling could be*

done. As those connected with the oil business will know, it takes time to build upon your acreage. We started in the early part of 1922, when Mr. Riddle became head of our production and land department. That continued, but results, of course, did not immediately come. We had to build up a geological department. We had to move our offices from Oklahoma City, where they had what to my mind was the old style individual producer's office, a land department that, in modern practice, would not have been recognized as a land department. Under Mr. Moore the offices were moved to Tulsa. Arrangements were made for a real land and leasing department.

In the Spring of 1923, by that time, and I think it was that time, *our production was falling, had fallen at a very alarming rate.* While we were all very hopeful of the results that were coming, they had not appeared to date. Accordingly, we wanted something in the nature of production to tide us over the emergency. Mr. Riddle, and Mr. J. Elmer Thomas, who was then working for us as a consulting geologist, were informed to that effect. They began, so to speak, to make a survey. It was not very long before both of those gentlemen came in with the earnest recommendation that the Bradstreet properties be acquired for a price, if I recall it, of some $600,000, possibly $650,000. The Bradstreet properties were earnestly recommended by both of those gentlemen, and, as those who are still associated with the Deep Rock know, those two men did not often agree on the same thing, but in that case they both agreed.

We finally purchased those properties, the physical property only, if my memory serves me, for a price of $500,000, approximately. In addition to that, we paid an additional sum of money for materials on the ground, and so on, which, generally speaking, are paid for independent of the actual price paid for the real property.

Q. Do you remember the amount that was paid for the inventory?

A. No, I can't say at present.

Q. To refresh your memory, was it $150,000?

A. Whatever it was worth to us was actually paid, but there is no obligation, ordinarily, to take over the inventory if you don't want to. That can be taken over, or the original owners can dispose of it.

Q. Do you know how the title to that property was taken at the time it was purchased?

A. My impression is it was taken in the name of a trustee.

Q. State whether it so remained during your term of office.

A. I have not had time, frankly, gentlemen, to brush up on some of these details, but I think it did. I will be glad to check it.

Q. Now, how long did that budget or appropriation of $50,000 a month, or expenditure, in development of oil properties, continue?

A. Until I retired as active manager. I don't know how long it continued after that." (Tr. 141-144)

He testified (Tr. 148) that either Mr. Riddle or Mr. Thomas (Ridle was Director of the Deep Rock and in charge of its production department) opened the negotiations for the purchase of the Bradstreet properties; "They were both in them equally, both of them knew Loren Bradstreet very well."

Q. "To whom did they make recommendations that the Bradstreet property be purchased?

A. To me." (Tr. 148)

They made those recommendations to me in Chicago; they came to Chicago and discussed the matter with me and recommended the purchase of it.

Q. "*Who did they recommend that purchase be made for?*

A. *That the purchase be made for the company, of course.*

Q. *That is the Shaffer Oil and Refining Company?*

A. *Right.*

Q. Who did you discuss the advisability of making the purchase with?

A. Well, you are asking a question there that requires a little explanation. We wanted to make all of these purchases for the Shaffer Company. But bear this in mind, gentlemen: At that time the Shaffer Company had no way of raising money except as it was advanced by the parent company. Now, also, regardless of where the title to the property ultimately rested, it had to be purchased through a trustee in order to permit permanent financing to be done. We had a *closed bond issue,* we did not have earnings sufficient to raise additional money, there was no other way it could be done except by doing it through a trustee, because if we put the title to those properties immediately to the Shaffer Company, *it became impregnated with that mortgage, and you couldn't do a darn thing with it.*

Q. With whom did you discuss the advisability of acquiring the Bradstreet properties?

A. I reported to some of our directors here in Chicago.

Q. What directors?

A. Men like O'Brien.

Q. Directors of the Standard Gas and Electric?

A. Yes, sir.

Q. *What did you decide to do about it?*

A. *We decided to buy.*

Q. *Who for?*

A. *To buy for the Shaffer Company.*

Q. *Well, it was taken in the name of J. C. Kennedy, as Trustee?*

A. *Simply because the Shaffer Company could not raise the money if they took it in any other way.*

Q. *Who was Kennedy trustee for?*

A. *That I can't answer without checking.*

Q. *You don't know what has been done with the title to those properties?*

A. *I don't know, after I left, no, sir.*

Q. You had nothing to do with the Deep Rock Oil and Refining Company?

A Since what time?

Q. Since its organization.

A. When was it organized?

Mr. Martin: February, 1923.

A. I had something to do with it, yes, sir, in those days.

Mr. Ramsey: What did you have to do with it?

A. It was organized during my time. As I recall it, the only purpose of the organization of the Deep Rock (Refining Company) was gradually to provide a *vehicle for additional financies,* but unfortunately, as you gentlemen know, before you can finance, you have got to build up something; that is, if you have a few hundred thousand dollars of property and go out and try to get money on it, you are laughed at.

Q. Who paid for the Bradstreet property, what company?

A. The money came through the Standard Gas and Electric Company.

Q. Did the Standard Gas and Electric Company pay for it direct to Bradstreet?

A. That I cannot answer without checking.

Q. Well, do you remember what was the plan for paying for it?

A. You have got to remember, gentlemen, when you ask me these details, it is some eleven years ago, I haven't had a chance to check." (Tr. 148-151)

It thus appears from Cummins' testimony that the Deep Rock was *sorely in need of additional production* and that the Bradstreet properties were purchased by and for the Deep Rock, but carried in the name of J. C. Kennedy, Trustee, in order to evade an apparent lien thereon to secure the payment of Deep Rock's First Mortgage Bonds.

B. W. Lynch also testified in regard to the Bradstreet properties, as follows:

Q. "Why were titles to the properties not transferred from J. C. Kennedy, trustee, to the Refining Company at the time of its organization in February of 1923?

A. The advance of the money at that time was conditioned upon the possibility of financing it publicly, and inasmuch as the *lien on the bonds then outstanding would extend to all property,* it was carried in that *vehicle* to make it possible for *future financing,* whether it was as a separate note issue, or perhaps a combination of the bonds then outstanding, namely, the mortgage bonds.

Q. The Deep Rock Oil and Refining Company had no outstanding bond issue, had it?

A. No, sir. The Shaffer Oil and Refining Company which I identify as Deep Rock Oil Corporation.

Q. It had an outstanding bond issue?

A. Yes, sir.

Q. But the Refining Company did not?

A. That's right.

Q. There wasn't any reason, then, so far as coming under any mortgages was concerned, why these properties should not immediately have been transferred to the Refining Company on the date of its acquisition in 1923?

A. No, except that necessarily they could have been carried as the trustee account, and *maybe never need the offices of the Deep Rock Refining Company for the financing.*

Q. During the period of 1923 to 1925, the proceeds of the Bradstreet properties went entirely to the Shaffer Oil and Refining Company, didn't they?

A. Yes, sir. Well, by 'proceeds' you mean the profits of operation?

Q. Yes.

A. Yes.

Q. The proceeds of sale of oil and gas produced by the properties.

A. Yes.

Q. Went to the Shaffer Company.

A. Yes.

Q. And the properties were operated by the Shaffer Company.

A. Yes.

Q. They were treated in every way identically the same as the other producing properties of the Shaffer Company, were they?

A. No, not as to ownership.

Q. No, not as to record title; but so far as the *operating end was concerned.*

A. Yes, that is right.

Q. And Shaffer paid the cost of operation, and paid the cost of development?

A. Yes.

Q. And it *did not charge* J. C. Kennedy, trustee, or the Standard *any interest* on the money advanced for those purposes, did it?

A. *No.*

Q. Now, Mr. Lynch, the cost of the properties was charged to J. C. Kennedy, trustee, wasn't it, on the books?

A. Yes.

Q. And they kept a separate account of what it cost to develop the properties, operate them, and that was charged to J. C. Kennedy, wasn't it?

A. The additional cost.

Q. But all of that was paid out of the funds of the Shaffer Oil and Refining Company, isn't that true?

A. Yes." (Tr. 315-317)

Mr. O'Brien testified (Tr. 19) that he recalls the purchase of the Bradstreet properties, and said, "That was very highly recommended by Mr. Riddle that we purchase the property. Mr. Gray looked over it, and the other parties, but it was particularly Mr. Riddle that recommended the purchase of that property."

Francisco testified (Tr. 198) that the Deep Rock expended $1,033,294.32 net in adding leases to and developing the Bradstreet properties between the date of their acquisition and the time the title was placed in the Deep Rock Oil

and Refining Company *in 1925.* (Tr. 222) Not only that, but Deep Rock, *after* October 1, 1925, expended the sum of $1,245,108.71 in the acquisition of additional leases for the account of Kennedy, Trustee, or the Refining Company (see Francisco's answer to the 6th interrogatory), *an indefensible diversion and misappropriation of its assets unless it, Deep Rock, owned all the stock of the Refining Company.* Although the sum was carried on the Deep Rock's books as against J. C. Kennedy, Trustee, that was nothing more than a book entry, as evidence to use against the First Mortgage Bond holders in the event they should claim a lien on the Bradstreet properties under the after-acquired property clause in the First Mortgage.

O. O. Kerr, Assistant Auditor of the Deep Rock, testified (Tr. 472-473) that between the date of the acquisition of the Bradstreet properties and October 1, 1925, the date of the lease shown by Exhibit "A" to Trustee's objections, the Deep Rock's earnings from the Bradstreet properties before retirement were $789,649.19, and after retirement, $659,879.10. (Tr. 473) Kerr corroborates the testimony of Francisco. (Tr. 224) Francisco defines retirement as covering the cost of drilling dry holes and the surrender of leases. It thus appears that the $659,879.10 was not the net from operations of the Bradstreet properties but the gross income from that property after deducting the cost of dry holes and the cost of leases surrendered or abandoned. Francisco testified (Tr. 224) that the Deep Rock was never called upon by anyone to account for either the net or gross earnings from the Bradstreet properties, realized by it from operations from February, 1923, to October 1, 1925. It was not called upon to account to J. C. Kennedy, Trustee, the Standard, or the Refining Company, and this fact is a conclusive circumstance that all the parties, the Standard and the Deep Rock and their officers, treated the Bradstreet properties as

belonging to the Deep Rock. The 7 per cent interest charged by the Standard on monthly balances against the Deep Rock's open account and the management fees charged by the Byllesby Engineering and Management Corporation refute the suggestion that the Standard, out of great liberality and generosity, permitted the Deep Rock to keep all the proceeds of the operations of the Bradstreet properties over a period of two years and seven months. It proves conclusively that Kennedy was holding legal title for Deep Rock, and how could Deep Rock become liable to pay rent on its own property?

(c) Cracking Plant—R. J. Graf, Trustee.

The testimony of Standard's officers and directors conclusively shows that the construction and operation of the cracking plant was and is an indispensable and inseparable adjunct to the Deep Rock refinery (a mere skimming plant, Tr. 87) and absolutely essential to the profitable operation of the refinery. Other refineries, as shown by the testimony of Majewski and others, were cracking up the gas oil and heavier products after skimming off the gasoline and products of crude petroleum and it became necesary for the Deep Rock, in order to survive, to install and operate cracking stills.

Being confronted with this necessity, the Standard's officers, in absolute control of the Deep Rock, devised the scheme of having the Deep Rock enter into a written agreement with R. J. Graf, as Trustee, on July 1, 1922, by the terms of which the Deep Rock agreed to deed to R. J. Graf separate fragments of land for a consideration of $2,906.25 under a covenant therein that the Deep Rock agreed to have the small parcels of land discharged from the lien of the mortgage dated June 1, 1929, executed to Continental and Commercial Trust and Savings Bank, Trustee, and William P. Kopf, co-trustee, to secure the Deep Rock's First Mort-

gage. (See Trustee's Exhibit ...) Thereafter and on December 6, 1922, the Deep Rock executed the deed. (Tr. 127-128)

(NOTE: Graf has no recollection of ever deeding the land upon which the cracking plant is located to anyone, and it was stipulated (Tr. 128) that Graf "has never assigned to anyone the Universal license claim or contract dated July 10, 1922, shown by Claimant's Exhibit 4, and also Claimant's Exhibits 5, 6 and 7." (R. Vol. 2, p. 646) Graf has never deeded the land to the Refining Company. See Section 8 of "Stipulation.")

As a fact, neither the consideration of $2,906.25 nor any other sum was paid for th execution of the deed either by R. J. Graf, Trustee, or S andard, or any other person or corporation.

Francisco, in answer to the 28th interrogatory addressed to him, asking who paid the consideration of $2,-906.25 for the deed executed by Deep Rock to Graf, as Trustee, testified, "There was no actual cash payment made of the $2,906.25, but this amount was charged on the books of the Deep Rock Oil Corporation to R. J. Graf, Trustee, and was part of the amount charged to Standard Gas and Electric Company on October 1, 1925." Of course, this charge on October 1, 1925, grew out of the scheme to have the Deep Rock lease the cracking plant and Bradstreet properties from the Refining Company.

Claimant's Exhibit 4 (R. Vol. 2, p. 643) shows that on July 10, 1922, R. J. Graf, Trustee, entered into a contract with Universal Oil Products Company for "the use of the so-called Dubbs Cracking Process under terms and conditions as set forth in the agreement referred to, a copy of which is hereto attached." The Standard made itself a party to this contract wherein it expressly "represented to Universal that said R. J. Graf, Trustee, represents interests

owned or *controlled* by said Standard." Standard did no
claim that R. J. Graf, as Trustee, represented it. Universa
agreed to "forthwith erect and complete the installation o
the four units specified in Article 2 of said contract with R
J. Graf, at actual net cost to Universal under the followin
conditions," one of these conditions being that Standar
guaranteed "full payment for the cost of said units com
pletely erected and installed under plans and specification
furnished by Universal and built under Universal's dire
tion." Standard also agreed "to promptly pay or *cause*
be paid to Universal from time to time during the course
construction as expenditures are made by Universal an
evidence thereof furnished to Standard Co., the cost of sa
work as it proceeds until the four units are completely erec
ed and installed."

The cost of the construction and installation rang
from $230,000.00 to $312,000.00, depending upon the numb
of expansion chambers installed for each unit, etc.

On the same day, July 10, 1922, as shown by Claimant
Exhibit 5, the Universal Oil Products Company entered in
a contract with R. J. Graf, Trustee, "an individual" whe
by the Universal granted to Graf, Trustee, "a non-exclusi
and non-assignable license to crack oil by the use of sa
inventions, processes and apparatus in the United States
America and the territories and possessions thereof, but
no other place or places except as may be later defined
writing between the parties hereto." This contract desi
nated the royalty to be paid for the use of the cracking pro
ess and the manner of payment, etc.

Nowhere in either of the contracts shown by Clai
ant's Exhibits 4 and 5, is the person or corporation f
whom Graf is to act as trustee named or designated, b
Claimant's Exhibit 5 calls for the erection of four units "
rapidly as possible at Cushing, Oklahoma, or at such oth

point as may be agreed upon in writing between" the parties.

Claimant's Exhibit 4 provides that "Universal agrees to the assignment of said contract by R. J. Graf, Trustee, upon request of said Standard Co. to such corporation as said Standard Co. may designate, providing said corporation is acceptable to Universal, as assignee of said contract," and Universal agrees on Standard's written request to grant additional license or licenses to Standard or its nominee or nominees "which shall be a corporation or corporations *owned, operated or controlled by* Standard Co., for the erection and operation of not to exceed a total of ten units in addition to the ten units which may be erected and operated under said license agreement with R. J. Graf," etc.

Claimant's Exhibit 6 (R. Vol. 2, p. 646) is a letter dated July 13, 1922, addressed by the Universal to R. J. Graf, Trustee, in which the Universal agrees "to construct for you four Dubbs Cracking Units on a site adjacent to the Shaffer Oil and Refining Company's plant, Cushing, Okla., to be selected and furnished by you under plans and specifications to be furnished by us. No charge to be made for the plans or specifications." This letter was accepted by R. J. Graf, Trustee, and constituted a contract between him and the Universal.

Claimant's Exhibit 6, the letter contract of July 13, 1922, between Graf and Universal, obligated the Universal to commence, within two weeks, the construction of the stills, but not later than August 1st, and as Majewski testified, the stills were completed and put in operation in February, 1923 (Tr. 94-95)—we have the following incidents:

(a) The contract for the acquisition of the Bradstreet properties by J. C. Kennedy, Trustee, on February 15, 1923.

(b) The organization of the Deep Rock Oil and Refining Company on February 26, 1923.

(c) The completion of the cracking stills in Febru 1923, under the provisions of the July 10, 1922, contrac

The Deep Rock *paid every dollar* of the cost of the c struction of the four cracking stills, etc., contracted for Graf, as Trustee, with the Universal, under Claimant's hibits 4, 5, 6 and 7, which, up to December 31, 1924, amou ed to $695,268.26, according to Francisco's testimony (214) and a total of $861,297.79 up to date title was put Refining Company (Tr. 216), and in addition Deep Rock pended on a new still and auxiliaries $375,350.58 between t date of the first lease and the second lease of October 1, 19 and after that up to February 28, 1933, the date of the ceivership, a further sum of $524,907.81. (Francisco's a swer to the 4th interrogatory, and Kerr's answer to the 14 interrogatory.)

Francisco testified no part of this cost was paid Standard, although Standard made advances to Deep Ro on open account, that is, advanced money to Deep Rock an charged Deep Rock with the respective amounts loaned fro time to time, with 7 per cent monthly interest thereon. (T 215) The amount of money borrowed from Standard an used by Deep Rock in paying the cost of the four Dubbs still is not disclosed by the record, but at any rate Francisco tes tifies, and nobody disputes his testimony, that the funds ad vanced by Standard to Deep Rock were just like other mon eys loaned by Standard to Deep Rock, and that Deep Rock received all the profits from the operation of the stills and did not account to either R. J. Graf, Trustee, or the Stand ard for any part thereof, because they were operated by the Deep Rock just as any other property of the Deep Rock was operated. (Tr. 215-216) The book account was carried by the Deep Rock against R. J. Graf, Trustee, *but no interest was charged on that account by the Deep Rock.* The fact that Standard advanced to Deep Rock all or a part of the money

expended by Deep Rock in the construction of the cracking stills did not create a resulting trust in favor of Standard or Graf, but created the *relation of debtor and creditor* between the Deep Rock and Standard. In 1925, at the time the Deep Rock's book account against Graf was transferred and converted into a debt against Standard and a credit to Deep Rock on its account with Standard in December, 1925, the total amount charged against R. J. Graf, Trustee, by Deep Rock was $861,297.79. (Tr. 216 and Francisco's answer to 47th interrogatory.) This switching of account was not accompanied by any deed from R. J. Graf to the Refining Company. Although Francisco has been a Director of Deep Rock continuously from 1923, he knows of no meeting of the Deep Rock's Board of Directors authorizing this account with R. J. Graf, Trustee, and in fact there never was any meeting of the Deep Rock's Board of Directors approving the so-called Graf, Trustee, set-up. (Tr. 209, 215-216)

Up to October 1, 1925, the Deep Rock's combined book account against J. C. Kennedy and R. J. Graf, Trustees, amounted to $1,894,592.11, which was nothing except a book record of the Deep Rock's expenditures in the acquisition and development of the Bradstreet properties and the construction and installation of the four Dubbs cracking stills. *All the earnings from the operation of the four cracking stills from the date of installation up to October 1, 1925,* were retained by Deep Rock and not paid over or credited to R. J. Graf, Trustee, the Standard, or the Refining Company. (Tr. 492) The amount of these earnings from the operation of the cracking stills from February, 1923, to October 1, 1925, was $829,749.69 "before retirement." (Tr. 473)

The Refining Company did not charge the Deep Rock on its books with anything for the use and occupation of the Bradstreet properties and the cracking plant. (Tr. 494)

Neither did the Deep Rock, on its books, credit the Ref ing Company with anything on account of the operation the Bradstreet properties and the cracking plant prior October 1, 1925. (Tr. 494)

Auxiliary equipment, such as re-run stills, treati plants, etc. (Tr. 511), constructed at the same time t Dubbs cracking stills were installed, were erected on la Deep Rock conveyed to R. J. Graf, Trustee. (Tr. 512) T auxiliary equipment cost the Deep Rock $276,065.95 (T 512) and according to Moody, Superintendent of the r finery, the auxiliary equipment was necessary to finish t gasoline that was produced from the Dubbs stills (Tr. 51 and he testified (Tr. 513) that the pressure stills were n complete except taken in connection with the auxilia equipment.

Majewski (Tr. 94) and *Moody* (Tr. 516) both testi that the cost of the four cracking stills proper was $31 906.50. *Moody* testifies (Tr. 517) that hot oil pumps we installed in June, 1925, at a cost of $32,685.24, and (T 518) in January, 1925, another still unit was added at cost of $107,010.29, making a total cost of the original fou units, plus the reaction chambers, cracking still No. 5 an the hot oil pumps, of $734,667.98. In December, 1925, a r run still was put in operation at a cost of $28,031.06. (T 518) All these items were constructed on the property co veyed to R. J. Graf, Trustee, and were paid for by Dee Rock.

The above figures given by Majewski and Moody ar not complete. Francisco, in answer to the 47th interrog tory, sets forth a statement "of the account between th Deep Rock and R. J. Graf, Trustee, prior to October 1 1925," by which he shows that Deep Rock expended on th property it had deeded to Graf, Trustee, the total sum o $861,297.79 prior to October 1, 1925. As heretofore state

neither Graf, trustee, personally, nor the Standard, nor any other person expended any money in the construction of the cracking stills or improvements on the property conveyed to Graf, Trustee.

Not only did the Deep Rock pay the cost of the construction and installation of the cracking stills constructed in the name of R. J. Graf, Trustee, but it paid all the royalties accruing to the Universal under Claimant's Exhibit 5, from the installation of the four Dubbs stills on through their retirement and the installation of new stills in their place. (Tr. 99-100)

Now as conclusive evidence that Graf was Trustee for the Deep Rock, we again call attention to the following:

(a) The Standard's admission in paragraphs two and six of its answer and reply to the Receivers' answer and counterclaim in the receivership case, Federal Equity No. 844, wherein Standard alleges "that the capital stock" of the Refining Company, "with the exception of qualifying shares, was issued to Deep Rock, thereby creating it the beneficial owner of all of the properties of said corporation, and that Deep Rock thereafter, in order to relieve its said property of the debt created in favor of Standard by the advance by it of the purchase price of said oil properties (meaning the Bradstreet properties) *and the cost of erecting said cracking plant, transferred to this intervener the said capital stock.*"

(b) That the Deep Rock paid all the consideration for the erection and installation of the cracking stills, etc., which, as a matter of law, created a resulting trust in the R. J. Graf, Trustee, property for the use and benefit of the Deep Rock.

(c) As conclusive evidence the Standard did not pay the cost of the cracking plant we have the fact that Standard

never charged R. J. Graf, Trustee, with its cost, nor did charge the Refining Company or Deep Rock therewi (Knourek's answer to the 40th interrogatory.)

(d) Then if Standard owned the Refining Compa stock why did it in 1925 credit Deep Rock with $649,999. for the purchase of Refining Company stock from J. Kennedy, Trustee?

Cracking stills necessary adjunct to Deep Rock Refinery.

W. E. Moody, a Deep Rock director since 1928, a Vice-President in charge of refining (Tr. 495) since 19 (Tr. 496) testified that at the time the refinery was acquir from Shaffer "it consisted of a battery of crude stills a about seven re-run stills" and "a wax plant and the nec sary equipment that goes with that tankage." (Tr. 497) T refinery had a capacity of 6,000 barrels per day (Tr. 49 and was known as a mere *skimming* plant. (Tr. 498) The pacity of the *skimming* plant was enlarged to 10,000 barr a day in about 1926. (Tr. 501 and Majewski's testimo Tr. 87.)

On original examination (Tr. 500) *Mr. Moody* w asked this question:

Q. "Mr. Moody, is the cracking plant *essential* to the su cess of the operation of the refinery?

A. Yes, sir.

Q. For what reason?

A. For the reason of what is known as octane gasoli which is the anti-knock property of your gasoline, whi is very much improved by the cracked product bei mixed with your straight run.

Q. And your gasoline which is marketed is largely ble or else made by the cracking unit itself?

A. Largely blend.

Q. Blended with the straight run gasoline?

A. Yes, sir."

Moody also testified (Tr. 508) that the cracking stills were used in connection with the refinery and that the charging stock is manufactured at the refinery. He was asked this question:

Q."In other words, the pressure stills were really just an adjunct to the refinery, is that not true?

A. Yes."

Majewski, in the Deep Rock's marketing department since its organization (Tr. 73) testified to facts conclusively showing that the installation of the cracking plant was absolutely necessary to the successful operation of the refinery. Majewski testified on original examination (Tr. 73-74) as follows:

Q."Were you familiar with the plan for the erection or installation of a cracking plant at the refinery in Cushing early after the purchase from Mr. Shaffer?

A. Yes, sir.

Q. I wish you would tell the history of that, and the reasons which led up to it.

A. The market at that time for fuel oil was very weak, very soft, and the sources that used fuel oil were becoming scarcer, due to coal competition. The Dubbs people, the Universal Oil Products Company, came to George Moore with a proposition to crack fuel oil into gasoline, which at the time showed to crack fuel oil would be a profitable venture, a very profitable venture. George Moore brought the proposition to the Standard Gas people, and they took on a contract for the purchase of a Dubbs unit, and *the reason for going* to the Standard people was that the Deep Rock, or the old Shaffer at that time, did not have the finances with which to build such a plant. It was necessary to get a *guarantor* who was substantial enough to satisfy the Universal people. A contract was entered into between

R. J. Graf, trustee, and the Universal people. R. J. Graf received a license and held the license for the erection of this plant. *And the reason for putting it in was the economic reason of finding a market for the fuel oil by cracking it into gasoline.*"

He further testified (Tr. 75) that previous to the installation of the cracking stills "we just had straight run gasoline, kerosene and the fuel oil" and that "the reason for putting in the plant was, as I stated before, to find a profitable market for the fuel oil."

Q. "And by the process of cracking the residuum, after running through the old style shell stills, what advantage in the way of quantity of gasoline, approximately, do you know was produced?

A. At that time we were getting from forty to forty-two per cent gasoline. Today, with the new unit, we are getting fifty to fifty-four per cent. (Tr. 75-76)

Mr. Ramsey: You mean you are getting that per cent from the cracking plant?

Mr. Gibson: Yes.

A. Out of cracking fuel oil." (Tr. 76)

He also testified (Tr. 76) there were a number of additions to the cracking plant between 1923 and 1931 "such as *auxiliary equipment* that was put in from time to time to keep up with the trend in the art of refining" and that "excepting for shut-downs for replacement of expansion chambers," etc., the cracking plant was in continuous operation to 1931 (Tr. 76) at which time they had to abandon the four original Dubbs stills to "make way for the new replacement unit." (Tr. 76) He also testified that "we put in an extra coiling operation, I believe in 1926 or 1927, modern additions to the equipment as they came out." (Tr. 78)

Francisco testified that he recalled the construction of the pressure stills Nos. 1 to 4, inclusive, in the year 1922 (Tr. 210):

Q. "You are very familiar with a refinery, aren't you?

A. You mean the refinery operation?

Q. Yes.

A. Yes, I think so.

Q. There was a refinery which belonged to the Shaffer Oil and Refining Company near Cushing at the time and prior to the construction of these pressure stills, was there not?

A. Yes, sir.

Q. I wish you would just relate the connection between the refinery as it was completed and being operated at that time and the pressure stills, how each was used in connection with the other.

A. The refinery at that time was what is known as a topping or skimming plant. It produced gasoline, kerosene, fuel oil, and gas oil. The market for fuel oil and gas oil was not a profitable market, and the idea of building the cracking plant was to enable them to crack the fuel oil into a more profitable product, that is, gasoline.

Q. The fuel oil was produced as a by-product of crude oil, was it not?

A. Yes.

Q. In the refinery proper?

A. Yes.

Q. And then it was charged in the pressure stills, is that true?

A. Well, that is after the pressure stills were built, yes.

Q. I mean after the pressure stills were built.

A. Yes, sir.

Q. So the crude oil did not go directly into the pressure stills?

A. No. On the other hand, fuel oil could be purchased and charged to the stills in the same way.

Q. Yes. Now, was the construction of these pressure stills considered by anyone in the Shaffer Oil and Refining Company organization before the contract was entered into for their construction?

A. Oh, yes. There was a thorough investigation of the different cracking processes.

Q. Who made that investigation for Shaffer Oil and Refining Company?

A. I think Mr. Moore, and I know I had something to do with it, and no doubt Majewski, I am not sure about that. Mr. Osthoff, for Standard Gas. In fact, there was a question at that time as to what sort of a cracking process should be installed.

Q. As an auxiliary to the refinery?

A. Yes.

Q. Was the matter ever laid before the directors of Shaffer Oil and Refining Company?

A. I don't recall.

Q. It was at least informally discussed by some of the directors of the company?

A. Yes.

Q. In whom was the title to the property on which the refinery was located?

A. Shaffer Oil and Refining Company.

Q. You know where the pressure stills were built, do you not?

A. Yes, sir.

Q. The title to that property was in the Shaffer Oil and Refining Company, was it not?

A. Before the pressure stills were built.

Q. Before the pressure stills were built?

A. Yes, sir.

Q. Now, at or about the time of the construction of the pressure stills, the title to the property on which they were built was transferred from Shaffer Oil and Refining Company to R. J. Graf, Trustee, was it not?

A. That is correct.

Q. That was in December, 1922, that the title was actually transferred?

A. Well, I would have to look that up.

Q. But that was pursuant to a written contract entered into prior to that time, was it not?

A. Well, I don't know just exactly when it was transferred. It was transferred.

Mr. Martin: It will be all right, won't it, Mr. Gibson, to supply a copy of the contract and a copy of the deed later for the record?

Mr. Gibson: Yes, indeed.

Q. (Mr. Martin:) Do you know why the contract for the construction of these pressure stills was made in the name of R. J. Graf, trustee?

A. Well, I don't think the Shaffer's credit was such that we could have made a contract ourselves.

Q. Did you try to?

A. I don't recall that. I know that we owed a lot of money at that time, both to the banks and supply companies.

Q. Do you know for whom Mr. Graf was trustee in the contract?

A. Mr. Graf stated he was trustee for Standard, Mr. Martin, in his testimony.

Q. The information you got, then, you got from Mr. Graf himself on that?

A. Yes, sir." (Tr. 210 to 214)

Majewski further testified (Tr. 93) that the Universal Oil Products Company owned the Dubbs patented cracking process, and that the original contract (Claimant's Ex. 4) was negotiated by Messrs. Osthoff, Henry Grenacher and Van Gilst (Tr. 92), and was reduced to writing in the name of R. J. Graf, Trustee, and the Universal (Tr. 93); that Grenacher was an engineer of the Standard and although not at that time, 1922, a Standard officer, "he was and is an officer of a subsidiary company, the Northern States Power Company" (Tr. 95); also that Van Gilst was a Standard employee "and later became construction engineer at the refinery for the" Deep Rock. (Tr. 95)

Majewski testified that the four Dubbs cracking stills required about nine months for their construction (Tr. 94)

and were completed and put into operation in February, 1923. (Tr. 75)

Graf is asked this question (Tr. 111):

Q. "How did you acquire the position of trustee for that company (meaning Standard)?

A. Under advice of counsel, I imagine, that was the way they wanted it handled at that time."

Plat of Deep Rock's refinery and the cracking plant.

Trustee's Exhibit "O" (R. Vol. 3, p. 148), taken in connection with Moody's testimony (Tr. 677, etc.), shows conclusively that the cracking plant was constructed and operated as a part of the refinery—that the refinery and cracking plant and auxiliaries were operated as a unit and a single system. The Refining Company's re-run stills were constructed on a small fraction of an acre adjoining the Deep Rock's steam stills so that anyone viewing the premises would conclude they were all a part of the same machinery. Pipe lines were run over the Deep Rock's land in the refinery grounds so as to connect cracking stills with the Refining Company's re-run stills.

Prospectus.

Charles Lehman-Charley v. *Bartlett*, 120 N. Y. S. 501;
Redfield v. *Lamb*, 103 Neb. 410, 172 N. W. 48;
Downey v. *Byrd*, 171 Ga. 532, 72 A. L. R. 345-353;
Greene v. *Mercantile Trust Co.*, 111 N. Y. S. 802;
Brackett v. *Griswold*, 112 N. Y. 454, 20 N. E. 376-379;
Henry v. *Dennis*, 95 Me. 24, 85 Am. St. Rep. 364, 383, 386, 388, 389;
Tindle v. *Birkett*, 171 N. Y. 520, 89 Am. St. Rep. 822;
P. Cox Shoe Mfg. Co. v. *Adams*, 105 Iowa 402, 75 N. W. 316;
Fletcher Cyc., Corporations, Perm. Ed., Vol. 12, page 602.

So long as necessary to aid Deep Rock in borrowing money from the public the Standard held out to the public, long after October 1, 1925, that the Deep Rock was the owner of the cracking plant. Thus in the prospectus issued by Deep Rock (R. Vol. 2, p. 297) under date of April 15, 1926, for the sale of Deep Rock's Two-Year Gold Notes in the sum of $7,500,000.00 (sold to the public), we find the following statement:

> "Shaffer Oil and Refining Company, incorporated in Delaware May 31, 1919, is a balanced, self-contained unit of the petroleum industry, embracing fully within its own organization, complete properties and facilities for the production, refining, transportation and marketing of its products, which are distributed under its widely known Deep Rock trade mark. The refinery, with daily capacity of 10,000 barrels, is located at Cushing, in the heart of the Mid-Continent field. It is a completely equipped plant, covering 391 acres, and *includes a cracking plant*, paraffin wax and lubricating oil equipment, and tank storage capacity of 2,090,000 barrels. Fuel requirements of the refinery are supplied by gas from the Company's own sources. The cracking process used is one of the most efficient known today. In addition there are four casinghead gasoline plants with total daily capacity of 20,000 gallons. The Company and its subsidiaries produce 75,000,000 gallons of gasoline products annually."

Also this prospectus discloses Deep Rock's stock ownership, as follows:

> "Standard Gas and Electric Company controls Shaffer Oil and Refining Company through ownership of preferred and common stock and will own, on completion of the present financing, 65% of the Company's preferred stock and 98% of its common stock. The operations of the Company are under the direction of men of long experience in the oil industry."

Now, bear in mind that the Standard, in listing the

names of its subsidiary and affiliated companies in its annual reports from 1923 to 1932, inclusive, listed Deep Rock among the number, but did not claim ownership of the Refining Company stock or any interest therein, until its annual report of December 31, 1929, which was issued some time in the early part of the year 1930. (R. Vol. 2, p. 601) This claim of ownership of the Refining Company stock was therefore not put to the public by the Standard until after the issuance and sale of the $10,000,000.00 notes dated March 1, 1928, maturing March 1, 1933.

The contract of March 6, 1928, between Deep Rock, first party, and H. M. Byllesby and Company, Janney & Company and Federal Securities Corporation, second parties, under which second parties subscribed for the $10,000,000.00 note issue of March 1, 1928, recites that "The terms of the Notes and of the Trust Agreement under which they are to be issued shall comply in all respects with the terms of this Agreement and with the statements in the attached copy of letter, marked Exhibit 'A,' by the President of the Company (said letter being by reference made a part hereof), and the form and validity of the Notes and the Trust Agreement and all other legalities incident to this transaction shall be subject to the approval of" certain attorneys, naming them. Then follows the provision that "The Company (meaning Deep Rock) *warrants* that upon the completion of the financing hereby contemplated the *statements of the copy of letter hereto attached as Exhibit 'A' concerning the capitalization of the Company, and the earnings of the Company and its subsidiaries, will be substantially true.*"

Section 5 of the contract obligates the Deep Rock to sell to the bankers heretofore named the $10,000,000.00 in notes at a price of 93½ cents on the dollar, plus accrued interest from March 1, 1928, to the date of payment, and provides that "The Notes *shall be offered* for sale by the Bankers to

the *public* at 98½% of the principal amount thereof, plus accrued interest from March 1, 1928, to the date of payment therefor." (See Trustee's Exhibit "X", page 158.)

It was clearly contemplated by the contract that these notes were not to be held by the bankers as investments, but that the bankers should have a margin of profit of five cents on the dollar and that they should be sold immediately to the public.

Mr. O'Brien (Tr. 45) in answer to the question, "What was done with the proceeds of the sale of those notes?" said, "• • • I think the circular tells all about it." He was then shown a *prospectus* marked Trustee's Exhibit "C" and asked to state whether or not it was used in selling the notes, to which he said, "I believe so," and also said there may have been other circulars that showed other partners in the business. Mr. O'Brien's attention was called to a letter under date of March 6, 1928, addressed to H. M. Byllesby and Company, Janney & Company, and Federal Securities Corporation, over the signature of John J. O'Brien, President, constituting a part of the printed prospectus, and he was asked whether or not he wrote that letter, to which he said, "I am sure I did." (Tr. 46) This letter of March 6, 1928, was made Exhibit "A" to the contract of that date between the Deep Rock and the aforementioned underwriting bankers.

On the first page of the prospectus, over the printed name of "H. M. Byllesby and Company, 231 South LaSalle Street, Chicago," appears the statement that

> "Mr. John J. O'Brien, President of the Company, summarizes his letter, dated March 6, 1928, as follows:
>
> "Shaffer Oil and Refining Company, incorporated in the State of Delaware May 31, 1919, is a balanced, self-contained *unit* of the petroleum industry, embracing fully within its own organization *complete* proper-

ties and facilities for the production, refining, transportation and marketing of its products. * * *

"The Company's refinery, having a daily capacity of 10,000 barrels, is located at Cushing, Oklahoma. In addition, the Company owns four casinghead gasoline plants having a total daily capacity of 21,000 gallons, pipe lines and gathering-pipe line system totaling 376 miles, and 626 tanks cars.

"The Company owns or controls oil leases covering 114,488 acres of oil lands in the States of Oklahoma, California, Texas, Kansas, Arkansas, Colorado, Louisiana, Montana, New Mexico and Mississippi, of which 11,159 acres are developed and on which a total of 569 producing wells are now in operation. The Company has a present daily average production in excess of 7,500 barrels. The Company and its subsidiaries produce approximately 87,500,000 gallons of gasoline products annually."

Then follows the statement that

"Through subsidiaries, the Company has retail distributing facilities through which were marketed for the 12 months ended December 31, 1927, approximately 49,500,000 gallons of gasoline and naphtha," etc.—

referring to kerosene, domestic heating oil, gallons of lubricating oils, fuel and miscellaneous oils, and the name of the principal territory through which the distribution of its refined products is carried on, stating the number of bulk filling stations and service stations, etc.

In Mr. O'Brien's letter of March 6, 1928, set out in the prospectus (and we must remember that Mr. O'Brien was not only President of the Deep Rock but also the Standard, H. M. Byllesby and Company and Byllesby Engineering and Management Corporation) he states that the Deep Rock "is a balanced, self-contained *unit* of the petroleum industry, embracing fully within its own organization *complete*

properties and facilities for the production, *refining*, transportation and marketing of its products." Under the caption "PROPERTY" in capital letters and in the middle of the page, Mr. O'Brien says:

> "The refinery, having a daily capacity of 10,000 barrels, is located at Cushing, Oklahoma, in the heart of the Mid-Continent field. It is a completely equipped plant, covering 391 acres, and *includes a modern cracking plant*, paraffin wax and lubricating oil equipment, and tank storage capacity of 2,315,000 barrels. Fuel requirements of the refinery are supplied by natural gas from the Company's own sources. *The cracking process used* is considered one of the most efficient known to the petroleum industry today. In addition, the Company owns four casinghead gasoline plants, having a al daily capacity of 21,000 gallons. The Company has its own pipe lines and gathering-pipe line system, totaling 376 miles, and gathers and pipes all of the crude oil which it refines. It has in operation a total of 876 tanks cars, 626 of which are owned by the Company and 250 are leased by it under favorable terms. Practically all the tank cars are from 8,000 to 10,000 gallons capacity.
>
> "The Company owns or *controls* oil leases covering 114,488 acres of oil lands in the States of Oklahoma, California, Texas, Kansas, Arkansas, Colorado, Louisiana, Montana, New Mexico and Mississippi, of which 11,159 acres are developed and on which a total of 569 producing wells are now in operation. The Company has a present daily average production in excess of 7,500 barrels and, for the 12 months ended December 31, 1927, produced 4,150,512 gallons of casinghead gasoline. The Company and its subsidiaries produce approximately 87,500,000 gallons of gasoline products annually." (R. Vol. 2, pp. 254-258)

Mr. O'Brien, H. C. Cummins, R. J. Graf, M. A. Morrison, B. W. Lynch, O. G. Corns, J. H. Briggs and R. G. Hunt, Deep Rock Directors who were present at the meeting of

the Deep Rock's Board of Directors on March 9, 1928, a
thorizing and approving the issuance of the $10,000,000.
in notes and the contract of March 6, 1928, with the afor
said bankers, were directors of the Standard and with M
jewski were the nine out of the Board of 15 directors of t
Deep Rock present at the March 9, 1928 directors' meetin
the other six Deep Rock directors, two of whom, John
Gray and F. W. Stehr, were also Standard directors, bein
absent. Mr. O'Brien's letter, made a part of the prospectu
and upon which the parties clearly contemplated the not
would be sold to the public, unqualifiedly and positivel
states that the Deep Rock is a "balanced, self-containe
unit of the petroleum industry, embracing fully within i
own organization *complete* properties and facilities for th
production, refining, transportation and marketing of it
products." Not only that, but it states positively that th
refinery "is a completely equipped plant, covering 391 acre
and includes a modern *cracking plant*, paraffin wax an
lubricating oil equipment, and tank storage capacity of 2
315,000 barrels."

Any one reading the prospectus, and especially Mr
O'Brien's letter of March 6, 1928, therein set out, would in
stantly conclude that the Deep Rock owned the crackin
plant as well as the paraffin wax and lubricating oil equip
ment. The purpose of the prospectus was to induce the pub
lic to purchase the notes. There is no ambiguity in Mr
O'Brien's letter. There is no difference in the duty to stat
the whole truth in a prospectus issued to sell notes and
bonds and in a prospectus issued for the sale of corpora
tion stock.

In *Downey* v. *Byrd*, 171 Ga. 532, 72 A. L. R. 345-353, the
Georgia Supreme Court said:

> "Promoters of a corporation, in the preparation of
> its prospectus, are bound to consider the effect that

would be produced upon an *ordinary mind* by the statements contained in them; and in estimating the probability of persons being misled by them, the court may take into consideration not only the facts stated but the *facts suppressed. Wiser* v. *Lawler,* 189 U. S. 260, 47 L. ed. 802. Subscribers to the stock of a corporation are entitled to know the cons as well as the pros." (Citing authorities.)

If the cracking plant did not belong to the Deep Rock but to the Deep Rock Oil and Refining Company, no mention of which is made in the prospectus, then the prospectus was a fraudulent misrepresentation not only by the Deep Rock but by the Standard. The fact that Mr. O'Brien's letter was addressed to the bankers and not to the public is immaterial because, as clearly shown by the contract between the Deep Rock and the bankers, dated March 6, 1928, and approved by the Deep Rock's Board of Directors on March 9, 1928, the notes were not banker investments, but were to be sold to the public.

In *Greene* v. *Mercantile Trust Co.,* 111 N. Y. S. 802, affirmed without written opinion in 112 N. Y. S. 1131, the New York Supreme Court, in discussing a prospectus or representations upon which corporate stock or bonds are sold, said:

"It is sufficient that such representations are made to the public at large for the purpose of influencing any individual who may act upon them. Any person so acting may maintain an action to recover for the injury sustained. Nor is it necessary that the person making the representations should himself receive the benefits and fruits of the alleged fraud. (Citing authorities.) This doctrine of law has been applied and enforced in numerous cases. It has been applied to cases where false and fraudulent statements have been made to commercial agencies for the purpose of obtaining fictitious ratings, and thereby securing credit."

Fletcher Cyc., Corporations, Permanent Ed., Vol. 12, page 602, says:

> "The representations need not have been made directly to the defrauded party, but it is sufficient if they are made to a third person with the intent that they shall be used by him to induce the sale of the stock, and they are by him communicated to the plaintiff, or if they are addressed to the public, as in the case of false statements in prospectuses, reports, or other statements issued by the corporation or its officers."

In *Brackett* v. *Griswold*, 112 N. Y. 454, 20 N. E. 376-379, the Court of Appeals said:

> "It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made, it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made *to the public at large*, for the purpose of influencing the action of any individual who may act upon it, any person so acting upon it, and sustaining injury thereby, may maintain an action. It is on this ground that promoters or directors of corporations have been held liable for false representations in a prospectus or reports, or other papers issued by the corporation with their sanction, by which individuals have been induced to purchase the stock, or become creditors of the corporation, and the fact that the false report or prospectus purports to be the act of the corporation, and not of the promoters or directors, does not relieve them from personal responsibility."

In Freeman's long annotations to *Henry* v. *Dennis*, 95 Me. 24, 85 Am. St. Rep. 364, the annotator, page 383, says:

> "One furnishing information to a commercial agency as to his means or pecuniary responsibility can have no other motive than to enable the agency to communicate such information to persons who may be interested in obtaining it for their guidance. And if he

makes a false statement with a view to obtain a credit to which he is not entitled, and thus defraud those who may resort to the agency, and, in reliance upon the false information there lodged, extend a credit to him, his liability is the same as if he had made the representation directly to the parties injured: *Soper Lumber Co.* v. *Halstead,* 73 Conn. 547, 48 Atl. 425; *Moyer* v. *Lederer,* 50 Ill. App. 94; *Furry* v. *O'Connor,* 1 Ind. App. 573, 28 N. E. 103; *P. Cox Shoe Mfg. Co.* v. *Adams,* 105 Iowa 402, 75 N. W. 316; *Genessee Sav. Bank* v. *Michigan Barge Co.,* 52 Mich. 164, 17 N. W. 790; *Mooner* v. *Davis,* 75 Mich. 188, 13 Am. St. Rep. 425, 42 N. W. 802; *Holmes* v. *Harrington,* 20 Mo. App. 661; *John V. Farwell & Co.* v. *Boyce,* 17 Mont. 83, 42 Pac. 98; *Eaton* v. *Avery,* 83 N. Y. 31, 38 Am. Rep. 389; *Humphrey* v. *Smith,* 39 N. Y. Supp. 1055, 7 App. Div. 442; *Converse* v. *Sickles,* 40 N. Y. Supp. 971, 17 Misc. Rep. 169, affirmed in 161 N. Y. 666, 57 N. E. 1107; *Wilmont* v. *Lyon,* 11 Ohio C. C. 238; *Aultman* v. *Carr,* 16 Tex. Civ. App. 430, 42 S. W. 614.

"A vendor may rescind a sale made on the faith of false reports to an agency: *P. Cox Shoe Mfg. Co.* v. *Adams,* 105 Iowa 402, 75 N. W. 316; *Naugatuck Cutlery Co.* v. *Babcock,* 22 Hun. 481, 485; *Gainsville Nat. Bank* v. *Bamberger,* 77 Tex. 48, 19 Am. St. Rep. 738, 13 S. W. 959; or he may hold the vendee liable in damages: *Hinchman* v. *Weeks,* 85 Mich. 533, 48 N. W. 790; *Eaton* v. *Avery,* 83 N. Y. 31, 38 Am. Rep. 389."

Under the title "Prospectuses" the annotator, pages 386-387, further says:

"The question of indirect fraud assumes no small importance in the matter of prospectuses. Those who issue a prospectus, holding out to the public the great advantages that will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, *are bound to state everything with scrupulous accuracy,* and not only to abstain from stating as facts that which is not so, *but to omit no one fact within their knowledge* the existence of which *might affect the na-*

ture, extent, or quality of the privileges and advantages that the prospectus holds out as inducements to take shares: *New Brunswick, etc., Ry. Co.* v. *Muggeridge*, 1 Drew & S. 363. * * *

"If it can be shown that a material misrepresentation or concealment is made in a prospectus respecting the enterprise, which results in injury to those induced to subscribe for stock, they are entitled to a rescission of their contract of subscription: *In re Reese River, etc., Min. Co.*, L. R. 2 Ch. 604, 609; *In re Coal, etc., Co.*, L. R. 1 Ch. D. 182, 189; *In re Metropolitan Ass'n*, L. R. (1892) 3 Ch. D. 1; *Central Ry. Co.* v. *Kisch*, L. R., 2 Eng. & I. App. 99. Or they may hold the promoters or directors personally liable: *Walker* v. *Anglo-American Mortg., etc., Co.*, 72 Hun. 334, 25 N. Y. Supp. 432; *Brewster* v. *Hatch*, 122 N. Y. 349, 25 N. E. 505; *Morgan* v. *Skiddy*, 62 N. Y. 319; monographic note to *Cottrell* v. *Krum*, 18 Am. St. Rep. 562; *New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. D. 73. Or an action of deceit may be maintained against the corporation: *Benedict* v. *Guardian Trust Co.*, 68 N. Y. Supp. 1082, 58 App. Div. 302.

"*It is immaterial that no specific statement is false, if the general impression conveyed by the prospectus is false: Aaron* v. *Twiss*, L. R., (1896) App. Cas. 372. * * *

"The inquiry next suggested is as to who is entitled to rely on a prospectus, and, having relied on a fraudulent one to his injury, may seek redress. It is not necessary that the false representations should be made directly to the injured party. It is enough that they are contained in a document, which *is meant to be circulated among a class of persons who are likely to be deceived.* The representations are regarded as made to each person comprehended within the class of persons who are designed to be influenced by the prospectus. When a prospectus of this character is issued, no other relation of privity between the parties need be shown except that created by the wrongful act of the defendant in issuing and circulating the prospectus, and the resulting injury to the plaintiff: *Morgan* v. *Skiddy*, 62 N. Y. 319, 325; *Clarke* v. *Dickson*, 6 Com. B., N. S., 453."

nder the caption "Representations of the Condition of orporations," the annotator, pages 388-389, says:

> "Closely analogous to the publication of fraudulent prospectuses, in the consequences springing therefrom, is the issuance of false reports of the condition of corporations. Before making representations as to the condition of the corporation as inducements to take stock therein or extend credit thereto, it is the duty of officers to use reasonable diligence to know that the representations are true, *and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them: Hubbard* v. *Weare,* 79 Iowa 678, 687, 44 N. W. 915. If false and fraudulent statements are put forth under the authority of directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by anyone dealing with the corporation, relying on the truth of such reports: *Solomon* v. *Bates,* 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478; *Houston* v. *Thornton,* 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827."

See, also:

P. Cox Shoe Mfg. Co. v. *Adams,* 105 Iowa 402, 75 N. W. 316;

Downey v. *Byrd,* 171 Ga. 532, 72 A. L. R. 345;

Tindle v. *Birkett,* 171 N. Y. 520, 89 Am. St. Rep. 822.

Fraud—true or false.

We are not here contending that the representations set forth in the prospectus were false and fraudulent, but that they *were true.* The failure to disclose other material facts in the prospectus presents another question. It is not necessary to prove facts essential to support an action for deceit.

Powell on Parent and Subsidiary Corporations, page 63, says that by misrepresentation "we do not mean a mis-

representation that would satisfy all the technical requirements of a common law action of fraud. That definition would be too narrow for in determining whether the conduct of the parent corporation has exceeded the bounds of normal control over the subsidiary, the courts are not confined to the rigorous limitations of an action for deceit."

The parent corporation's advertisement of assets is binding on it and will make the assets of the separate subsidiary corporation assets of the parent corporation, subject to the parent corporation's debts.

Thus in *Westinghouse Electric & Mfg. Co.* v. *Allis-Chalmers Co.*, 176 Fed. 362-367, the Third Circuit Court of Appeals said:

> "In corroboration of these averments it is charged that the Allis-Chalmers Company *advertised its entry upon the electrical field*, giving as its reason the facts that it has acquired the plant of the Bullock Company, that its own electrical department consisted of or comprised the plant of the Bullock Company, and that its intention was to go on with the manufacture of the Bullock Company's product. Since these significant averments are either admitted in terms, or are only met by the formal denial of control, 'save as the Allis-Chalmers Company is lawfully entitled thereto as the holder of such majority of stock,' we think the situation justifies a court in acting upon it. The two corporations evidently *preserve their separate organizations;* but the *control* of the Bullock Company's business is exercised by the Allis-Chalmers Company, which has taken over all that is valuable in this business and *made it a department of its own.*
>
> "The substance of the matter is that the Allis-Chalmers Company is the *unquestioned master*, whose orders are obeyed, and we think that under such circumstances a court of equity may well look behind the corporate screen and determine where the real and responsible power lies. It is not a question where the

formal legal title to the property rests. The bill avers —and the answer passes the averment over in silence— that even the ownership of the property may have passed, for it charges that either the ownership of the property has been transferred, or, if not the ownership, at least the control, and the answer confines such denial as is made solely to the transfer of control, and says nothing whatever about the transfer of ownership. But we lay *no stress upon the ownership* of the legal title to the property. It is enough for the present purpose to note that on the face of the pleadings the power to control, operate, and manufacture is in the Allis-Chalmers Company and is being exercised by that company. In our opinion, therefore, it is liable for the infringing act complained of as being its own act done through a controlled agency."

The above opinion of the Third Circuit Court of Appeals makes very pertinent the testimony of B. W. Lynch, Chairman of the Standard's Finance Committee, Vice-President and member of its Board of Directors, and Vice-President and Director of the Byllesby Engineering and Management Corporation, wherein he testified (Tr. 316) that during the period from the acquisition of the Bradstreet properties to October 1, 1925, the date of the lease, Deep Rock operated the properties and appropriated all the proceeds and profits to its own use and benefit, paid the cost of operations and development and made book entries of cost of additional properties and development to J. C. Kennedy, Trustee, *without interest.* He was asked this question:

Q. "They were treated in every way identically the same as the other producing properties of the Shaffer Company, were they?

A. No, not as to *ownership.*

Q. No, not as to record title, but so far as the operating end was concerned?

A. Yes, that is right." (Tr. 316)

In *Platt* v. *Bradner Co.*, 131 Wash. 573, 230 Pac. 633, the court held that although a writing signed by the corporation's president without authority "by any corporate act" to bind it as a contract in writing under the statute of frauds, guaranteeing payment by the other corporation, was insufficient as a guaranty under the statute of frauds, nevertheless the president may bind the corporation by declarations and admissions, against interest, within the scope of his duties and pertinent to issues involved in actions against the parent corporation. The corporate entity of the two corporations was ignored by the Washington Supreme Court.

As said in Encyclopedia of Evidence, Vol. 1, page 362, "Admissions implied from conduct are usually indirect, or incidental, * * *. They result from the conduct of a party consistent with a state of facts against his interests and inconsistent with some claim made by him in the controversy in which his conduct is sought to be proved."

Thus in *Steed* v. *Knowles*, 97 Ala. 573, 12 So. 75, it appeared that in the years 1876 and 1877, A. had the land involved in the suit assessed as belonging to S. and M., and that in 1878, G., the vendee of the plaintiff and subvendee of M., and A. each gave in for assessment a one-half interest in the land. The court held that evidence of such facts was admissible as an admission that M. owned an interest in the lands during the years 1876 and 1877, and that G. owned a half interest in the lands in 1878.

In *Lefever* v. *Johnson*, 79 Ind. 554, in a suit to recover personal property, it was held that the tax list, sworn to by a party, showing no claim to the property, was admissible in evidence against him. The court said:

> "The list was a statement in writing, signed in the firm name and sworn to by appellants; it was made out

under the direction of a public officer, in pursuance of a duty enjoined by law, and is competent evidence tending to show the amount and kind of property owned by them assessed at that time."

In *Whitfield* v. *Whitfield,* 40 Miss. 352, the court held that it is admissible, in a contest over the title to personal property between the father and representatives of the deceased son, to show by the assessor's books that during the time the property was in the possession of the son, it was assessed, not as the property of the son, but of the father.

In Encyclopedia of Evidence, Vol. 1, page 574, it is said:

"The rule is that where a number of persons have a joint interest or privity of design, or are jointly liable, the admission of one relating to such joint matter is, in the absence of fraud, competent against all."

The Standard was materially and financially interested in the flotation of the $10,000,000.00 in notes under date of March 1, 1928. H. M. Byllesby and Company, the top holding corporation, underwrote $5,000,000.00 of the notes and sold them to the public. Not only as a stockholder but also as a creditor the Standard was jointly and vitally interested with the Deep Rock in procuring purchasers of the notes, as heretofore pointed out. Although not guaranteed by the Standard, H. M. Byllesby and Company indirectly and morally vouched for their validity and the Deep Rock's ability to pay them.

Concealment—prospectus.

The prospectus states that the Deep Rock was organized on May 31, 1919, and that the proceeds of the $10,000,000.00 Gold Notes, due March 1, 1933, with the proceeds from the sale of common stock of the Company "will be

used to retire the Company's present outstanding $1,843,70
First Mortgage 6% Bonds due June 1, 1929, $7,500,000 Tw
Year 6% Gold Notes due April 15, 1928, $4,250,000.00 6%
Gold Notes due December 31, 1931, and to reimburse th
Company for expenditures for additions and extension
heretofore and now being made to its properties, and fo
other corporate purposes." Anyone reading the prospectu
would assume that the proceeds from the sale of the $10
000,000.00 notes and sale of common stock would wipe ou
all the Deep Rock's indebtedness and leave a surplus *"fo
other corporate purposes."* As a matter of fact, the Dee
Rock was then indebted as follows:

(a)	To Standard on open account..... (See O'Brien's statement at Deep Rock Directors' meeting April 11, 1928.)	$ 6,872,400.0
(b)	To Standard for 6% Gold Note due December 31, 1931.....	4,250,000.0
	(NOTE: Total indebtedness to Standard, $11,122,400.00.)	
(c)	To principal of Deep Rock's two-year 6% Gold Notes, due April 15, 1928..	7,500,000.0
(d)	To interest and service fees on above notes	228,525.0
	(NOTE: The interest on these notes was not included in Standard's credit of $11,122,400.00 settled by the stock purchase in 1928. Knourek, Tr. 618-619))	
(e)	To principal and interest on First Mortgage Bonds	1,922,110.2
	(See item 11, Exhibit "A" to Standard's claim.)	
This makes a total indebtedness of.....		$20,773,035.2

This large outstanding indebtedness was a material fact in view of the incorporation of the Deep Rock on May 31, 1919, a little less than 9 years prior thereto. One contemplating buying the notes would naturally want to know the Company's total indebtedness as well as its capital stock. The prospectus did not disclose that the Standard, the dominating corporation, claimed an indebtedness against the Deep Rock in the sum of $11,122,400.00. It required $9,650,635.23 to retire the balance of the first mortgage bonds with interest ($1,922,110.23)—(see Item 11, 1st page of Exhibit "A" to Standard's claim)—and the two-year six per cent gold notes due April 15, 1928, $7,500,000.00, with interest and service charges in the sum of $228,525.00. As the proceeds of the sale of the $10,000,000.00 in notes amounted to $9,395,151.80 (8th item, Credit Sheet, Exhibit "A" to Standard's claim), we find a shortage of $255,483.43—lack that much of producing enough to retire the first mortgage bonds with interest, and the $7,500,000.00 two-year notes. This of course left $255,483.43 less than nothing "for other corporate purposes," as represented in the prospectus.

In accordance with the contract of March 6, 1928, between the Bankers and the Deep Rock, the Standard was to and did (Tr. 300) subscribe for 222,448 shares of Deep Rock common stock at $50.00 per share and paid for the same by cancelling the $4,250,000.00 Deep Rock note and its open account, $6,872,400.00, which totalled exactly $11,122,400.00, thus leaving the Deep Rock indebted to Standard in the above sum of $255,483.43. The 14th item on the 3rd page of Exhibit "A" to Standard's claim credits Deep Rock with only $11,122,400.00 in payment for the 222,448 shares of Deep Rock common stock, thus confirming the misrepresentation in the prospectus that the flotation of the $10,000,000.00 in notes and sale of common stock would leave something "for other corporate purposes."

Eight of the nine Deep Rock Directors present at the Directors' meeting on March 9, 1928, authorizing the issuance of the $10,000,000.00 in notes and the contract with the bankers, were also officers and directors of the Standard. The Standard was guarantor of the Deep Rock's First Mortgage Bonds, of which there was then outstanding and unpaid, due June 1, 1929, $1,922,110.23, principal and interest. (See Exhibit "A" to Standard's claim.) Likewise the Standard held Deep Rock's 6 per cent Gold Note due December 31, 1931, in the sum of $4,250,000.00. The Deep Rock's indebtedness to Standard at that time totalled $11,122,400.00. (R. Vol. 2, p. 624)

In the Deep Rock's contract of March 6, 1928, with the bankers, approved at the Directors' meeting held on March 9, 1928, it was agreed that the Deep Rock should cause a change in its capital stock and the retirement of its indebtedness in the manner therein set forth. It was agreed, as shown by the contract, that "Under the reclassification of said participating preferred stock as aforesaid, the 90,000 shares thereof now owned by Standard Gas and Electric Company, a Delaware corporation, shall be converted into 180,000 shares of common stock of the Company." Also agreed that, "The 40,000 shares, of the par value of $1.00 each, of Class A Common Stock of the Company, now outstanding and owned by Standard Gas and Electric Company shall, prior to said reclassification of participating preferred stock, be converted into a like number of shares of common stock." Agreed that "Said Standard Gas and Electric Company shall purchase, at the price of $50.00 per share, 222,448 shares of said common stock and, in payment therefor shall release and cancel $11,122,400.00 of indebtedness from the Company to Standard Gas and Electric Company."

The issuance and sale of the $10,000,000.00 March 1, 1928 notes were under discussion in Chicago for five or six months by Mr. O'Brien, Morrison, Lynch and other Standard officials, and principally with the bankers, which means H. M. Byllesby and Comapny. (Tr. 309)

These facts lead unerringly to the conclusive inference that the Standard treated the Refining Company as an adjunct to and agency of the Deep Rock, and operated the Deep Rock as its mere adjunct and agency, and as Standard's adjunct caused the Deep Rock to issue and sell the $10,000,000.00 in notes dated March 1, 1928, and caused the amendment of Deep Rock's capital structure in order to float the loan. (Tr. 291-292)

Lynch testified (Tr. 309):

Q. "When was the issuance of the Shaffer ten millon dollar notes due March 1, 1933, first discussed?

A. Oh, perhaps the preceding five or six months approaching the maturity.

Q. It was discussed here in Chicago by you and Mr. O'Brien and Mr. Morrison and other officials of the Standard Gas and Electric?

A. Well, it was discussed by us here, but the principal discussions would be with the banking group and investment houses in the east preparatory to a maturity."

The Standard received the proceeds of the sale of the $10,000,000 in notes (see 8th item in credit column, 3rd page of Exhibit "A" to Standard's claim) and paid the balance due on the First Mortgage Bonds and $7,500,000 in notes due April 15, 1928, and subscribed for common stock in satisfaction of Deep Rock's indebtedness to it. *The statements in the prospectus are as much the statements of the Standard as of the Deep Rock or H. M. Byllesby and Company.* If the statement was true in March, 1928, that the Deep Rock's refinery "is a completely equipped plant, covering

391 acres, and includes a modern cracking plant, para wax and lubricating oil equipment" and that "The cra ing process used is considered one of the most effici known to the petroleum industry today," there has b *nothing alleged or proven to show that the cracking pla after March 1, 1928, was conveyed to the Deep Rock and Refining Company,* or that the stock of the Refini Company was owned by the Standard, and not by the De Rock. If that statement was false, then it was a fraud, a yet as said in *Demarest* v. *Winchester Repeating Arms C* 257 Fed. 173, "The universal rule is that fraud is ne presumed. The legal presumptions are in favor of hone and fair dealing."

In *Jones* v. *Simpson,* 116 U. S. 609, 29 L. ed. 742, court approved the trial court's instruction to the ju that "The law presumes, in the absence of evidence to contrary, that the business transactions of every man done in good faith and for an honest purpose; and anyo who alleges that such acts are done in bad faith, or fo dishonest and fraudulent purpose, takes upon himself business of showing the same."

The United States Circuit Court of Appeals for Eigth Circuit, in *United States* v. *Mammoth Oil Co.,* 14 (2d) 717, said, "While the law presumes the good faith business transactions, fraud may be the only legitimate a proper inference that can be drawn from the circumstan disclosed. It is not necessary in a civil action that fraud established beyond a reasonable doubt."

In *Tucker* v. *Traylor Engineering & Manufacturi Company,* 48 F. (2d) 783, Judge McDermott, speaking the Tenth Circuit Court of Appeals, said (page 78 "Fraud is never presumed; it must be established by cle satisfactory and convincing evidence."

See, also:

Superior Oil Corporation v. *Matlock*, (10th Cir. Apps.) 47 F. (2d) 993.

(d) Basis of Standard's Alleged Title to Refining Company Stock.

The lease dated October 1, 1925, was made without any authority of the Deep Rock's or the Refining Company's Board of Directors or Executive Committee. (Paragraph 11 of "Stipulation," R. Vol. 2, p. 244.) It appears from Francisco's testimony that on March 19, 1926, the Standard's general auditor wrote Francisco a letter (R. Vol. 2, p. 52), enclosing two copies of the lease already executed on behalf of Deep Rock, dated October 1, 1925 (Trustee's Exhibit "J"), with directions to have John L. Gray, as President, and Francisco, as Secretary of the Refining Company, execute the lease on behalf of the Refining Company.

(NOTE: Standard's officers, acting as Deep Rock officers, executed it for Deep Rock.)

The letter of the Standard's general auditor, addressed to O. O. Kerr, Deep Rock's General Auditor, dated December 22, 1925, refers to the following telegram of December 10, 1925 (Exhibit No. 9 to "Stipulation," R. Vol. 2, p. 308):

"Chicago, Ill., December 10, 1925.

"W. R. Francisco,
Treasurer, Shaffer Oil & Refining Co.
Tulsa.

In accordance with conversation your recent visit take into October operating expense seventy-five thousand dollars as accrual for lease rentals. This same account will be taken into November and December operating expenses. Complete details will be sent you in the next few days.

B. F. Braheney."

(NOTE: Braheney's letter of December 22, 1925, is quoted in full herein on page 71.)

The Kennedy account was transferred to Standard (T
207) so as to show the Deep Rock had a credit with t
Standard of $649,999. The entries on Deep Rock's boo
were made by Mr. Kerr, on the authority of the letter
ceived from Braheney, Standard's general auditor, dat
December 22, 1925 (Tr. 208, and Kerr's answer to the
and 2nd interrogatories.) Exhibit "A" to Standard's cla
contains these two items: "Transfer of J. C. Kenne
Trustee, open account to Deep Rock Oil Corporation"
1925, amount $649,999; also "Acquisition of 8,325 shares
common stock of Deep Rock Oil and Refining Company fr
Deep Rock Oil Corporation" in 1925, amount $649,999.
each item offsetting the other.

In Braheney's letter of December 22, 1925, he sa
"*No entries had been placed on the books of the Shaf*
Oil and Refining Company for the purchase of this stock
the investment was *advanced* by the Standard Gas a
Electric Company and has been charged to you in open
count." As heretofore pointed out, Standard had been c
rying this sum as a charge against Kennedy, Trustee, a
charging Deep Rock seven per cent interest, which shows
was a Deep Rock debt to Standard.

This October 1, 1925 lease was hatched out by Sta
ard in December, 1925, and not in September, 1925. This
shown by Knourek's answer to the 64th interrogatory, fr
which it appears Standard, after October 1st, continued
charge Deep Rock with interest on the "J. C. Kenne
Trustee account" for October and November, 1925, and th
some time in December, 1925, reversed the charges so
to credit Deep Rock with the interest charges for Octo
and November. (See Knourek, Tr. 615-616)

To change this set-up and place the Refining Company
stock in the Standard's nominee was the forerunner for
lease by the Refining Company to the Deep Rock. Lit

wonder Lynch testified that he did not think the Standard owned the Refining Company stock at all times. (Tr. 313) The Standard, in its printed annual reports, names all its affiliated and subsidiary corporations and states its stock holdings. It listed the Deep Rock as one of its subsidiary and affiliated companies in all of its reports, but not until its report for the year ending December 31, 1929, did it list the Refining Company. In its report for that year (Trustee's Exhibit J, R. Vol. 2, p. 601) it named the Refining Company as one of its subsidiaries and stated that its issued capital stock was 9,000 shares, all of which was owned by Standard.

Including the original cost of the Bradstreet properties, to-wit, $650,000.00, the development cost, $1,033,294.32, and the Deep Rock's expenditures on the cracking plant, $861,297.79 (Francisco's answer to the 47th interrogatory), we find Deep Rock had a total investment of $2,544,592.11 up to October 1, 1925.

Lease—depletion and depreciation.

This brings us to the unconscionable lease executed some time in the latter part of March, 1926, as of October 1, 1925. This lease called for a rental of $75,000.00 per month for the last three months of 1925, and $50,000.00 a month for four years and nine months thereafter, making a total of $3,075,000.00.

As conclusive evidence that both leases were unconscionable, we call attention to the three following damning facts and attendant circumstances:

First. The Deep Rock's total earnings from operations of the cracking plant and Bradstreet properties, with additions, from some time in February, 1923, to October 1, 1925, a period of two years and seven months, *without allowing anything for depreciation and depletion* otherwise

than abandonment of leases and cost of dry holes, was $1,489,628.79. (Kerr, Tr. 473, and Francisco, Tr. 224.) This would show a monthy income of $48,052.54 spread out over the two years and seven months. Whether some months produced no income or earnings is not shown. A flat fixed rental made no allowance for fluctuations in the prices of crude oil and refined products—no allowance for bad or good years. Assuming the Deep Rock transferred the 9,000 shares of Refining Company stock to Standard or its nominee in consideration for Standard's absorption of the purchase price of the Bradstreet properties, $650,000.00 (Tr. 194) and development and additions thereto, $1,033,294.32 (Tr. 221-222) plus cost of cracking stills, etc., paid by Deep Rock, $861,297.79 (Tr. 216), we have a total investment of 2,544,592.11. *Omitting the extra $75,000.00* rental paid for the first three months of the October 1, 1925, lease and figuring the rental at $600,000.00 per annum, we find that Standard would receive on its investment an annual income in excess of *23-1/2* per cent, free from all hazards incident to the oil producing and refining business.

> (NOTE: However, as Standard charged the Refining Company on open account (Knourek's answer to the 52nd interrogatory and later in 1926 covered by its note, Tr. 563-564) the $1,894,592.11 (composed of the cost of the cracking plant, $861,297.79, and cost of development and additions to the Bradstreet properties, $1,033,294.32) its actual investment was only $650,000, the original cost of the Bradstreet properties. On that basis, Standard's annual income from the investment of only $650,000.00 amounted to *93 per cent, minus.)*

In addition to this, the lease dated October 1, 1925, not only obligated the Deep Rock to pay this rental of $3,075,000.00 but also obligated it to advance all the working capital "necessary for any additions to or betterments to the leased property" and of course pay and account for all operating expenses, including "*interest, depreciation and depletion* in

connection with said property and to pay any and all carrying charges that might be incurred in connection with the said property." The lease also provided that should any additional leases be acquired in the name of the Refining Company "then such properties shall be included in the lease hereof, *provided, however,* that the cost of acquiring such property shall have been advanced by the Shaffer Oil and Refining Company."

Second. The *renewal* lease executed December 20, 1930, as of October 1, 1930, shown by Exhibit "B" to Trustee's objections, was for five years from October 1, 1930, at a rental of $600,000.00 per annum, payable monthly in the sum of $50,000.00.

Exhibit 16 to Francisco's answer to the 48th interrogatory shows that the Deep Rock sustained *losses* in the operation of the *Bradstreet properties* and additions during the period of the first lease, from October 1, 1925, to October 1, 1930, as follows:

During 1927	$ 443,116.14
During 1928	247,996.44
During 1929	333,282.51
During 1930	261,502.73
Total	$1,285,897.82

Exhibit 16 to Francisco's answer to the 48th interrogatory shows the Deep Rock made net earnings, after rentals,

For the year 1925	$124,666.75
For the year 1926	470,659.52
Total	$595,326.27

This leaves a net loss for the first five years, of $690,571.55. (R. Vol. 2, p. 188 and Vol. 3, p. 23.)

Not only that, but Exhibit 17 to Francisco's answer to the 49th interrogatory shows that the Deep Rock sustained

the following annual *losses* on the *cracking plant* during the period of the first lease, to-wit:

During 1927	$295,044.85
During 1930	111,677.77
Total	$406,722.62

The Deep Rock's net earnings from the operation of the cracking plant during the term of the first lease were:

For the year 1925	$ 15,236.42
For the year 1926	308,253.86
For the year 1928	390,750.88
For the year 1929	352,651.61
Total	$1,066,892.77

leaving a net gain on the cracking plant of $660,170.15, and a net loss on both properties of $30,401.40. (R. Vol. 2, p. 188, and Vol. 3, p. 24.)

But this is not all. According to Francisco's answer to the 4th interrogatory Deep Rock expended in the construction and installation of the new 800-barrel Dubbs unit (Still No. 5), condensers, buildings, tanks, boilers, etc., $375,350.58 between January 1, 1925, and December 31, 1930, of which sum $264,680.51 was expended between October 1, 1925, and October 1, 1930.

This is not all. In March, 1927, Standard charged Deep Rock with Delaware statutory representation service for the Refining Company, the sum of $150.00; again in May, 1927, Standard charged Deep Rock with statutory representation service for the Refining Company, the sum of $50.00; again in July, 1927, the Standard charged Deep Rock with "Income tax 1st Half 1926 DRO&R Co." (meaning the Refining Company), the sum of $40,500.00 (Tr. 537), in September, 1927, Standard charged Deep Rock with $50.00 for statutory representation service for the Refining Company; again

in September, 1927, Standard charged Deep Rock with the Refining Company's 3rd quarter income tax for 1926, in the sum of $20,250.00; again in December, 1927, Standard charged Deep Rock with Refining Company's income tax for the 4th quarter of 1926, in the sum of $20,250.00; in February, 1928, Standard charged Deep Rock with $150.00 for the Refining Company's Delaware statutory representation service; in April, 1928, Standard charged Deep Rock with the Refining Company's federal income tax for the 1st quarter of 1927, in the sum of $20,250.00; in April, 1928, Standard charged Deep Rock with the Refining Company's statutory representation service in the sum of $50.00; in June, 1928, Standard charged Deep Rock with the Refining Company's federal income tax for the 2nd quarter of 1927, in the sum of $20,250.00; in September, 1928, Standard charged Deep Rock with the Refining Company's federal income tax for the 3rd quarter of 1927, in the sum of $20,250.00; in December, 1928, Standard charged Deep Rock with the Refining Company's federal income tax for the 4th quarter of 1927, in the sum of $20,250.00; in February, 1929, Standard charged Deep Rock with the Refining Company's statutory representation service in the sum of $150.00; in April, 1929, Standard charged Deep Rock with the Refining Company's statutory representation service in the sum of $50.00; in February, 1930, Standard charged Deep Rock with the Refining Company's statutory representation service in the sum of $150.00, and in April, 1930, Standard charged Deep Rock with the Refining Company's statutory representation service, in the sum of $50.00. (See Knourek's answer to the 21st interrogatory.)

It also appears from Knourek's answer to the 64th interrogatory that Standard, in December, 1926, charged Deep Rock with the Refining Company's federal income tax in the amount of $29,565.91. This makes a total of Standard's charges in the sum of $192,415.91, which Standard claims

the Deep Rock was obligated to pay under the terms of the October 1, 1925 lease, in addition to the $3,075,000.00 rental.

Third. In addition to the payment of the flat rental the lease of December 20, 1930, also obligated Deep Rock to "advance all working capital necessary for any additions to or betterments to the leased property" and to "pay and account for all operating expenses, *interest, depreciation and depletion* in connection with the said property and to pay any and all carrying charges that might be incurred in connection with said property." It also provided that the lease should include any additional leases acquired by the Refining Company, provided, "that the cost of acquiring such property shall have been advanced by the Deep Rock Oil Corporation." In other words, the effect of the leases was to obligate the Deep Rock to return the property at the end of the lease with additions and betterments thereto of a value equivalent to the depreciation and depletion, or pay the Refining Company the difference between the value of the property at the date of the termination of the lease, and the date of the execution of the lease, as a sum covering the depreciation and depletion. *No lease of this character was ever made on earth by any sensible man or business corporation, and yet it is insisted by claimant that the Deep Rock ought to pay a large management fee for the services of the Byllesby Engineering and Management Corporation for its advice to enter into this lease.* That both leases obligated the Deep Rock to restore the property at the end thereof in as valuable a condition as when the lease was executed was so understood by Standard, is shown by Mr. O'Brien's testimony. He testified (Tr. 63):

Q. "Well, the Shaffer Oil and Refining Company, that is the Deep Rock Oil Corporation, had agreed to operate the cracking plant belonging to the Deep Rock Oil and Refining Company, and also operate the oil leases, the Bradstreet properties, and sustain all depletion and depreciation, is that correct?

A. I think it is.

Q. In other words, at the end of the operating term by the Deep Rock Oil Corporation, it would be responsible to Deep Rock Oil and Refining Company for the same value of its properties as of the date the Shaffer Oil and Refining Company took the management and operation of it, is that correct?

A. That is right.

Q. In addition to being required to reimburse the Deep Rock Oil and Refining Company for the amount of depletion and depreciation sustained or suffered, it was required to pay $225,000.00 for the last three months of the year 1925, and $50,000.00 a month rental for four years and nine months thereafter. That is correct, is it?

A. I believe it is, although I would have to look into that a little further to be sure."

Mr. O'Brien was also at that time, October 1, 1925, and now, President of the Deep Rock, the Standard, the Byllesby Engineering and Management Corporation, as well as H. M. Byllesby and Company.

Assuming Standard actually owned the Refining Company stock, it is inconceivable that the Deep Rock officers, in the exercise of the meagerest business sense, would have renewed the lease on the $600,000.00 per year rental basis with the added obligation to sustain all depletion, etc., unless they were acting for and in the interest of Standard.

On December 20, 1930, the five-year lease had resulted in the following losses to Deep Rock:

(a) Net loss on operations	$ 30,401.40
(b) Cracking plant depletion, replacements and new still	264,680.51
(c) Statutory service representations and Refining Company income taxes	192,415.91
Total	$487,497.82

(NOTE: This does not take into account Deep

Rock's expenditures for additions, etc., to Bradstreet properties during the duration of the October 1, 1925 lease.)

Besides this the *outlook* for the coming years was not bright. Claimant's Exhibit 14 (R. Vol. 2, p. 650) shows Deep Rock's net earnings *from all sources* had dropped from $1,365,437.50 in 1929 to $350,000.00 in 1930. We were in the midst of the worst economic and financial depression the World has ever witnessed, and according to Francisco's figures in his answer to the 48th and 49th interrogatories, Deep Rock had lost in 1930 on the cracking plant $111,677.77 and on the Bradstreet properties, $261,502.73. That the "signs" were bad is shown by the 1931 large losses on both the cracking plant and the Bradstreet properties.

Losses under renewal lease.

Exhibits 16 and 17 (R. Vol. 3, pp. 23-24) to Francisco's answers to the 48th and 49th interrogatories show Deep Rock lost *(a)* on the Bradstreet properties in 1931, $429,003.94, in 1932, $382,007.51, and the first two months in 1933, $42,254.70, and *(b)* on the cracking plant in 1931, $336,038.51, and $266,675.56 in 1932, and $128,477.83 in the first two months in 1933, *making a total loss under renewal lease of $1,584,456.05 up to the date of the receivership on February 28, 1933. In the face of imminent insolvency and these enormous losses for 1931, 1932, and January and February, 1933, Standard took from Deep Rock as rentals, $100,000.00 in January and February, 1933, and $100,000.00 in 1932.*

Not all yet. Claimant's Exhibit 21 (R. Vol. 2, p. 651), in connection with Kerr's testimony (Tr. 523, etc.) shows that the receivers, for the last ten months of 1933, suffered a net loss on the Bradstreet properties of $4,527.61, and on the operations of the cracking plant a net loss of $131,701.69, making a *total loss* of *$136,229.30.*

The four Dubbs stills intalled in 1922 and 1923 became obsolete (Tr. 513) and abandoned in 1930 (Tr. 498) "to make way for the new replacement unit" (Majewski, Tr. 76, 96, 99). The new replacement was a "much larger single unit" than the original four cracking stills (Tr. 498), and, as testified by Majewski (Tr. 103) "*without it you would not be operating the refinery today.*" The new replacements cost $375,350.58 and were paid by the Deep Rock, and not by the Refining Company or the Standard. (Francisco's answer to the 4th interrogatory.)

Majewski further testified in regard to the replacement or re-built cracking plant in 1931 (Tr. 77):

> "The Deep Rock Oil Corporation people handled the transaction, but it was handled in the Deep Rock Oil and Refining Company name, for the account of the Deep Rock Oil and Refining Company. We operated the old units two years beyond their economic life, due to the fact that we were short of cash, and trying to make it string out, and finally we persuaded the Standard to advance some money so that we could put in this modern unit. It is a 4000-barrel unit, the last word in cracking equipment at that time, there was no such plant built like it. And the reason for putting in this large unit was to get the maximum octane value, which was necessary to compete with other competitors who had reforming and cracking units of late model. Cracked gasoline is highly essential. Straight run gasoline has a considerably lesser market value than cracked gasoline or leaded gasoline."

Also filtering or other cleaning processes were put in in 1931, including the Gray Towers. (Tr. 78-79) Gray, *whose salary was being paid by Deep Rock*, suggested the new replacement unit still (Tr. 103) without which, as said by Majewski, "you would not be operating the refinery today." (Tr. 103) The Deep Rock had its own engineering department (Tr. 521) which worked out the amount of money re-

quired, which was approved by the Deep Rock's Board of Directors and submitted to the Standard's officers or directors, and approved by them. (Tr. 81, 82, 104, 520) The new still was constructed by the Universal Oil Products Company and the Deep Rock paid the royalties although the contract was never assigned to the Deep Rock. (Tr. 99, 100) The Universal constructed the plant through its own engineers. Byllesby Engineering and Management Corporation rendered no services. (Tr. 513-514)

After the first lease was renewed in 1930 Deep Rock expended in the construction of the 4,000-barrel unit for the cracking plant before the receivership on February 28, 1933, $523,489.38, according to Kerr's answer to the 14th interrogatory, and $524,907.81, according to Francisco's answer to the 4th interrogatory. Standard claims all this must be borne by Deep Rock under the depletion and replacement clauses in the two leases. According to Kerr's answer to the 14th interrogatory Deep Rock's total expenditures on the cracking plant amount to $1,594,108.22. Subtracting the $861,297.79, Deep Rock's expenditures on the cracking plant up to October 1, 1925, we find Deep Rock has expended on the cracking plant since October 1, 1925, $732,810.43 (Francisco's answer to the 47th interrogatory) which Standard claims under the leases Deep Rock was obligated to spend for the benefit of the Refining Company in addition to the monthly rentals. This proves beyond peradventure the leases were unconscionable.

In the face of all these losses, the renewal of the leases on December 20, 1930, as of October 1 1930, is utterly inconsistent with honesty and fair dealing.

Revocation.

Standard will no doubt undertake to justify the fairness of both leases by saying that if the Deep Rock found

either unprofitable it could have protected itself by cancelling the same on thirty (30) days' written notice on conditions therein named, which were by no means fair to the Deep Rock. In view of the fact that Deep Rock lost on the Bradstreet properties in 1931, $429,003.94, and in 1932, $382,007.51, and lost on the cracking plant in 1931, $336,038.51, and in 1932, $266,675.56 (Exhibits 16 and 17 to Francisco's answers to interrogatories, R. Vol. 3, pp. 23, 24) the conclusive presumption arises that Deep Rock was not represented by a. ; officers exercising independent judgment and discretion. Approximately three-fourths of the Deep ock's Board of Directors during the entire term of both leases were Standard directors and officers, and this accounts for the failure of the Deep Rock to take advantage of the cancellation clause.

According to claimant's Exhibit 14 (R. Vol. 2, p. 650), t Deep Rock's 1929 net income of $1,365,437.50 dropped in 1930 to $350,000.00. Th Deep Rock went into the red in 1931, 1932, and 1933, according to Claimant's Exhibit 14.

The very fact that Deep Rock's Board of Directors, dominated by the Standard's Board of Directors, did not exercise the power of cancelling the leases shows conclusively that the leases were made and *continued* for the use and benefit of the Standard, without any regard to the best interest of the Deep Rock.

Fair?

The power of cancellation was mutual. The Refining Company, whose directors were dummies and controlled by Standard, likewise had the power to cancel the lease upon 30 days' written notice. *The cancellation, however, would not operate to revest the Deep Rock with title to the Refining Company's stock.* If the Bradstreet properties had turned out to be worth millions, or the cracking plant had

earned large profits, the Standard, acting through the Refining Company's Board of Directors, had the power to cancel the lease on 30 days' written notice and retain title to the 9,000 shares of the Refining Company's stock. Such a lease is unfair and unconscionable.

The real reason for the mutual revocation clause dropped out in Mr. O'Brien's testimony. (Tr. 20) *He says Gray, in recommending the enlargement of the cracking plant "stated it would practically pay for the cost of it in two years at the outside." Bearing Gray's optimistic opinion in mind Standard put in the mutual revocation clause under which it could cancel the lease if it proved more profitable to the Refining Company without the lease, knowing all the while that under its power of control over Deep Rock it, Standard, could continue the lease if that was the more profitable course for it. In fact the Standard's control over both corporations made the revocation clause a mere idle gesture.*

A revocation clause was discussed in *Day* v. *Postal Telegraph Co.*, 66 Md. 354, 7 Atl. 608, wherein the Chief Justice, after a long statement of the facts and the issues, said:

> "That the Postal Telegraph Company of Baltimore City was formed at the instance and by the procurement of the Postal Telegraph & Cable Company admits of no doubt; and it is equally free of doubt that the Maryland Company was formed for the purpose, and with the distinct understanding on the part of those engaged in its organization, of acting as a mere *auxiliary organization to the New York company.* Indeed, Armstong, who, from the organization of the Maryland company to the time of the decree appealed from, was its president, states in his testimony that, in the organization, he acted for the New York company. He says, 'I was in the employ of the construction department of the Postal Telegraph & Cable Company, and it was dur-

ing that employment that I organized this (the Maryland) company. I was paid for my services by the Postal Telegraph & Cable Company.' Mr. Cummins, who was one of the organizers and directors of the Maryland company, was at the time vice-president and general manager of the New York company. And it is proved beyond doubt that all the money for the construction of the telegraph lines in Maryland, including payments for the right-of-way, if any was in fact paid for right-of-way, was *furnished by the New York company,* and the construction of the lines was under the direction and supervision of the agents of that company. Indeed, the certificate of incorporation of the Maryland company bears intrinsic evidence of the fact that the company was not designed to have stock with which to raise capital for the construction of telegraph lines, or acquire other property. The capital stock was merely nominal, being $500 only. This capital stock was divided into five shares, of a hundred dollars each; and of the five directors named in the certificate the three resident directors were each furnished by the New York company, according to their testimony, with the $100 to pay his subscription. This was simply to capacitate the parties to act as directors. It would appear that the two New York directors paid nothing for the stock that was allotted to them. After the organization of the local company, the resident directors took little or no interest in the management of its affairs, and attached no interest to the stock held in it, but left everything to the control and management of the *agents appointed* by the New York company.

"It appears that the telegraph lines in Maryland were constructed at a cost of about $75,000.00, but it does not appear that there was any negotiation for this large sum with which to construct telegraph lines, nor is there any evidence furnished by the proceedings of the local company to show that the lines of telegraph were constructed on account of that company. On the contrary, the evidence points conclusively to the fact that the telegraph lines, with everything appurtenant

thereto, were *constructed for and on account of the New York company exclusively;* and the subsequent user and management of the property are consistent with no other supposition. From the time of the construction of the lines to the time of their going into the hands of the receivers they were in the *full and complete possession* of the New York company, and it does not appear that that company ever kept any account with the Maryland company for money expended for or for money advanced to it, but *received and appropriated all the revenues* derived from the operation of the lines in this state *as from its own property.* It would seem, from the facts of the case, that it was not until this latter company became embarrased, indeed, hopelessly insolvent, that an arrangement was made whereby the telegraph property in Maryland should be turned over to the Maryland company. This, of course, if legally done, would have the effect of withdrawing the telegraph property from the reach of the creditors of the insolvent foreign corporation, unless the Maryland company can be made to pay and reimburse the New York company all the money expended in the acquisition of the property in question.

"The contention of the Maryland company is that the telegraph lines, while in fact constructed by the New York company, were constructed and used under an agreement whereby the New York company undertook to operate the lines, as a part of its system of telegraph, without loss or injury to the property, and that such agreement was *terminable* at the pleasure of either party, and that the same has been terminated since the property was placed in the hands of the receivers, and but recently before the case was decided by the court below. But by what authority that agreement was made, or when made, except that it is said to have been made between Armstrong and Cummins, both of whom were officers in the Maryland company, is not disclosed; nor have we anything more than the bare statement that there was such an agreement. There is nothing produced to evidence the action of the board of di-

rectors of either company in regard to such contract, and that a matter of such importance should have been dealt with so loosely is almost beyond the bounds of credence. That the New York company should have expended $75,000 in the construction of telegraph lines as a part of its own system, for a corporation only in name, without any capital, wholly irresponsible, and agreed to hold and use those lines simply at the will and pleasure of such irresponsible corporation, and that, too, without any well-authenticated contract by which it could be secured is, if true, one of those *remarkable transactions, fortunately, that seldom occur among business men.*

"It is alleged in the answer that the agreement for operation of the lines was to subsist until *termination at the election of EITHER party;* but Armstrong, in his testimony, states that it was to subsist 'until such time as the parties should elect to terminate it.' * * *

"But it is said that the Maryland company *issued its obligations* for the money expended by the New York company in the construction of the lines of telegraph in Maryland. It is true, Armstrong, the president of the Maryland corporation does say that that company gave to the New York company its obligations for the payment of the money expended. He seems, however, to be studious to withhold all information in regard to the circumstances under which the obligations were issued—when issued, and to whom delivered, and the nature and amount of such obligations. Whether they were issued by the authority of the company, in such form as to bind it, and whether before or after the affairs of the New York company were placed in the hands of receivers, there is not the slightest evidence to show. All that he says is that such obligations were issued, he *thinks*, early in the spring of 1885. 'I cannot,' he says, 'be more explicit in what way.' * * *

"Without further notice of the grounds of defense urged in the argument, this court, in view of all the facts disclosed by the record, entertain no doubt as

to the equity and right of the matter. The New York corporation being hopelessly insolvent, it is the right of *its creditors to avail themselves of any assets that may be found within the jurisdiction of this state;* and a court of equity will, regardless of any mere *forms* or *covers,* exercise its powers for protecting and making available such assets for the benefit of creditors.

"The property in question was constructed with the means and for the use of the Postal Telegraph & Cable Company, and the Postal Telegraph Company of Baltimore City *has no real or substantial interest* in it as owner. The property, therefore, should be devoted to the payment of the debts of its real owner, the New York corporation; and to that end the property should be sold by the receivers. If there should be a surplus of the proceeds of sale, after the payment of such debts as may be established, that surplus may be paid over to the New York receivers, upon exhibition of due authority to receive it. We shall therefore reverse the decree of the court below, and remand the cause, that a decree may be passed in accordance with this opinion."

CONTROLLING STOCKHOLDER.

By virtue of its ownership at all times of approximately 95 per cent of Deep Rock's common stock (stock with sole voting power except during a contingency that did not happen), Standard not only had power to control the Deep Rock, but did actually EXERCISE control and complete dominion over Deep Rock's corporate affairs, business contracts, and finances since 1921, and this being true, the Refining Company's leases of October 1, 1925, and December, 1930, to Deep Rock, having been made as a mere nominal conduit through which Standard diverted from Deep Rock to itself these large sums disguised as rentals, cannot be upheld on any theory because the consideration to Deep Rock was utterly inadequate, the terms of the leases unfair,

and the whole transaction unconscionable and made for the benefit of the Standard, to the enormous injury of the Deep Rock.

On page 46 of the Standard's 1929 annual report, which was not issued until probably January or February, 1930, appears the following note:

> "This balance sheet does not include Deep Rock Oil and Refining Company, the entire property of which is leased to Shaffer Oil and Refining Company. The rentals received from such lease accrue to Standard Gas and Electric Company through its ownership of the entire capital stock of Deep Rock Oil and Refining Company."

The 1929 Standard annual report is the first one containing that statement. It appears in substantially the same language in the subsequent annual statements of the Standard.

The Deep Rock never paid, or pretended to pay, the Refining Company any of the rentals accruing under the leases. The Refining Company simply charged the rental each month to Deep Rock and then declared an equivalent dividend in favor of the Standard. *It was all a matter of bookkeeping.* None of the rentals credited by Standard to Deep Rock were paid to the Refining Company. (See Knourek, Tr. 593, 595, and Knourek's answer to the 33rd interrogatory.) Refining Company's first dividend ($225,000.00 exactly the first three months' rental under the October 1, 1925 lease THOUGH NOT then executed by the Refining Company) was declared in a Directors' meeting held at 231 South LaSalle Street, Chicago, on December 31, 1925, by R. J. Graf, B. W. Lynch and J. H. Briggs (all Standard and Deep Rock officers and directors) acting as the majority of Refining Company's board of five directors. (See Exhibit No. 24 to "Stipulation.") The second dividend, $300,000.00, was declared at a meeting held at 231 South LaSalle Street, Chicago, on June 28, 1926 (Exhibit No. 26 to "Stipu-

lation"), and thereafter on July 26, 1926, at a meeting at the same Chicago address a $50,000.00 dividend was declared. Thence on at Tulsa, Oklahoma, monthly dividends of $50,000.00 were declared from August, 1926, to March, 1931, inclusive. (Sections 38, 39 and 40 of "Stipulation.")

Under the long established rule these leases must be adjudged fraudulent and void and items of rental charges in Standard's account totalling $4,525,000.00 disallowed, and the total rental payments made charged to Standard and credited by Standard on its open account against Deep Rock. This is true because, using the language of Judge PHILLIPS, the leases were *(a)* "unfair and unconscionable," *(b)* not for the best interest of the Deep Rock, *(c)* but "subserve the *selfish purpose* of such *stockholder,*" the Standard.

Thus in *Heim* v. *Jobes,* 14 F. (2d) 32, Judge PHILLIPS, speaking for the Eighth Circuit Court of Appeals, said:

> "One who owns the *majority* of the stock of a corporation and who *dominates* and *controls* such corporation may contract with the corporation, and such contract will be upheld where the consideration moving to the corporation is *adequate, where the terms of the contract are fair to the corporation, and where the contract will further the best interests of the corporation.* But a court of equity will hold such majority stockholder to the observance of the *highest rectitude* in dealing with the corporation, and, where the contract is *unfair or unconscionable,* where the consideration is inadequate, *or where the contract is not for the best interests* of the corporation but subserves the *selfish purpose* of such stockholder, it will set aside such contract at the instance of the corporation or its minority stockholders."

In support of this rule, Judge PHILLIPS cites:

> *Mumford* v. *Ecuador Development Co.,* 111 Fed. 639, 643;

Meeker v. *Winthrop Iron Co.*, 17 Fed. 48, 50, 51;

Ervin v. *Oregon Ry. & Nav. Co.*, 20 Fed. 577, 579, 580;

Ervin v. *Oregon Ry. & Nav. Co.*, 27 Fed. 625, 632;

Rogers v. *Nashville, C. & St. L. Ry. Co.*, 91 Fed. 299, 311-314;

Rothchild v. *Memphis & C. R. Co.*, 113 Fed. 476, 479-481 (6th Cir. Apps.);

Stebbins v. *Michigan Wheelbarrow & Truck Co.*, 212 Fed. 19, 28 (6th Cir. Apps.);

Pennsylvania Canal Co. v. *Brown*, 235 Fed. 669, 684 (3rd Cir. Apps.);

Hyams v. *Calumet & Hecla Mining Co.*, 221 Fed. 529, 537 (6th Cir. Apps.);

Jones v. *Missouri-Edison Electric Co.*, 144 Fed. 765, 771-775 (8th Cir. Apps.);

Wheeler v. *Abilene Natl. Bank Bldg. Co.*, 159 Fed. 391, 393-395 (8th Cir. Apps.), 16 L. R. A. (NS) 892, 14 Ann. Cas. 917;

Gamble v. *Queens, C. W. Co.*, 123 N. Y. 91, 99, 25 N. E. 201, 9 L. R. A. 527;

Heffern Co-Op. Consol. G. M. & M. Co. v. *Gauthier*, 22 Ariz. 67, 193 Pac. 1021, note 16 L. R. A. (NS) 898;

Fletcher, Cyc. Corporations, Vol. 6, Secs. 3973, 4035;

14 C. J., p. 870, Sec. 1330.

On this subject, Judge SANBORN, speaking for himself and Circuit Judges HOOK and ADAMS, in *Wheeler* v. *Abilene Nat. Bank Bldg. Co.*, 159 Fed. 393, said:

"A corporation holds its property in trust for its stockholders. The stockholders have a joint interest in the same property and in the same title. Community of interest in a common property or title imposes a community of duty and a mutual obligation to do nothing to impair either. It creates such a *fiducial rela-*

tion as makes it inequitable for any of those who thus share in the common property to do anything to or with it for their own profit, to the detriment of others who have the same rights. *Jackson* v. *Ludeling*, 21 Wall. 616, 622, 22 L. ed. 492; *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 771, 75 C. C. A. 631, 637; *Booker* v. *Crocker*, 132 Fed. 7, 8, 65 C. C. A. 627, 628.

"The holder of the majority of the stock of a corporation has the power, by the election of *biddable directors* and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual if not the technical, trustee for the holders of the minority of the stock. He draws to himself and uses all the powers of the corporation. In effect he holds an irrevocable power of attorney from the minority stockholders to manage and to sell the property of the corporation, for himself and for them. Times, places, and notices of meetings of the directors and of meetings of stockholders become of secondary importance, because the presence, the vote, and the protest of holders of the minority of the stock are unavailing against the will of the holder of the majority. They can act and contract regarding the corporate property, they can preserve and protect their interests in it, only through him and through the courts.

"The devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a *fiduciary* or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to *make the property of the corporation produce the largest possible amount*, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their *just proportion* of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or *any other act in his interest* to the detriment of the holders of the minority of the stock, becomes a breach

of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and *invokes plenary relief from a court of chancery. Jackson* v. *Ludeling,* 21 Wall, 616, 622, 22 L. ed. 492; *Jones* v. *Missouri Edison Electric Co.,* 144 Fed. 765, 771, 75 C. C. A. 631, 637; *Burnes* v. *Burnes,* 137 Fed. 781, 790, 70 C. C. A. 357, 366; *McCourt* v. *Singers-Biggers,* 145 Fed. 103, 107, 76 C. C. A. 73, 77; *Pepper* v. *Addicks,* (C. C.) 153 Fed. 383, 405; *Wardell* v. *Railroad Company,* 103 U. S. 651, 658, 26 L. ed. 509; *Menier* v. *Hooper's Telegraph Works,* 9 Ch. App. Cas. 350, 352, 353; *Goodin* v. *Cincinnati & Whitewater Canal Co.,* 18 Ohio St. 169, 182, 183, 98 Am. Dec. 95; *Ervin* v. *Oregon Ry. & Nav. Co.,* (C. C.) 20 Fed. 577, 580; *Id.,* 27 Fed. 625, 632; 2 Story's Eq. Jur., Secs. 1261, 1262; *Save* v. *Culver,* 147 N. Y. 241, 247, 41 N. E. 513; *Farmers' Loan & Trust Co.* v. *N. Y., etc., R. R. Co.,* 150 N. Y. 410, 425, 430, 44 N. E. 1043, 34 L. R. A. 76, 55 Am St Rep 689; *Hinds* v *Fishkill, etc., Gas Co.,* (Sup.) 88 N. Y. Supp. 954, 957; *Meeker* v. *Winthrop Iron Co.,* (C. C.) 17 Fed. 48; *Sidell* v. *Missouri Pac. R. Co.,* 78 Fed. 724, 727, 24 C. C. A. 216, 219; *Barr* v. *N. Y., L. E., & W. R. R. Co.,* 96 N. Y. 444, 449, 451, 456; *Wright* v. *Oroville M. Co.,* 40 Cal. 20, 27; *Pondir* v. *N. Y., L. E. & W. R. R. Co.,* 72 Hun. 384, 390, 25 N. Y. Supp. 560; *Gregory* v. *Patchett,* 33 Beavan 595, 607; *Meyer* v. *Staten Island Ry. Co.,* 7 N. Y. St. Rep. 245, 248. The reason for this rule is the detriment to the holders of the minority of the stock from such sales and transactions and not the benefit the holder of the majority derives therefrom. *Symmes* v. *Union Trust Co.,* (C. C.) 60 Fed. 830, 865; *Memphis & Charleston R. R. Co.* v. *Woods,* 88 Ala. 641, 7 South. 108, 7 L. R. A. 605, 16 Am. St. Rep. 81. It is the duty of the *master of the corporation* who sells its property to procure the highest possible price for it *(Jackson* v. *Ludeling,* 21 Wal. 616, 625, 22 L. ed. 492); and if he sells it to himself for less, the sale is voidable by the holders of the minority of the stock at their option, although he paid the fair market value for it. *Miller* v. *Brown,* 1 Neb. (Unof.) 754, 95 N. W. 797.

"The principles which have been briefly reviewed and the decisions which have been cited in support of them spring from the law's *jealous care of the fiduciary relations* from its persistent endeavor to prevent a conflict of duty and interest by removing from every person in such a relation every possible temptation to advance his own welfare in disregard of his duty to his correlate, by avoiding every transaction in which he has endeavored to do so. *They have been repeatedly discussed in the Supreme Court and in this court, and a more extended consideration of them is now unnecessary.*"

Common directors.

Assuming, *without conceding,* that Standard legally owned the Refining Company's stock, nevertheless approximately three-fourths of Deep Rock's Board of Directors were Standard's Directors at the same time, and the other Deep Rock Directors were owned body and soul by the Standard and dared not exercise any independent judgment of their own.

(NOTE: At the time the October 1, 1925 lease was made, 12 of the 15 Deep Rock Directors were Standard Directors and Deep Rock's President was President of Standard and also Byllesby Engineering and Management Corporation. Nearly all of Deep Rock's Executive officers were likewise Executive officers of Standard. (See Exhibits 15 and 16 to "Stipulation.") Approximately the same common membership is true at the time the renewal lease of 1930 was made.)

Under these circumstances the burden of proof is on the Standard to show the original lease and the renewal lease were fair and equitable because there is a presumption they were fraudulent.

—*Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 65 L. ed. 425;

Corsicana National Bank v. *Johnson*, 251 U. S. 68, 64 L. ed. 141;

Fletcher's Cyc. Corporations, Perm. Ed., Vol. 3, Sec. 974;

Bridgens v. *Dollar Sav. Bank*, 66 Fed. 12;

Illinois Oil Co. v. *Pender*, 137 Okl. 82;

Bentley v. *Zelma Oil Co.*, 76 Okl. 116;

Barnes v. *Lynch*, 9 Okl. 156;

Mathieson Alkali Works v. *Arnold, Hoffman & Co.*, 280 Fed. 132;

City Trust Co. v. *Bankers' Mortgage Loan Co.*, 102 Neb. 532, 167 N. W. 785;

Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 587, 23 L. ed. 328;

10 Cyc. 819;

Finefrock v. *Kenova Mine Car Co.*, 22 F. (2d) 627 (4th Cir. Apps.);

Globe Woolen Co. v. *Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378;

Hyams v. *Calumet & Hecla Mining Co.*, 221 Fed. 529 (6th Cir. Apps.).

In *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 599, 65 L. ed. 432, the court said:

"The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness; and where a sale is involved, the full adequacy of the consideration. *Especially is this true where a common director is dominating in influence or in character.* This court has been consistently *emphatic* in the application of this rule, which, it has declared, is founded in soundest morality, and we now add, in the *soundest business*

policy. Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 587, 588, 23 L. ed. 329, 330, 3 Mor. Min. Rep. 688; *Thomas* v. *Brownville, Ft. K. & P. R.* Co., 109 U. S. 522, 27 L. ed 1018, 3 Sup. Ct. Rep. 315; *Wardell* v. *Union P. R. Co.*, 103 U. S. 651, 658, 26 L. ed. 509, 511, 7 Mor. Minn. Rep. 144; *Corsicana Nat. Bank* v. *Johnson*, 251 U. S. 68, 90, 64 L. ed. 141, 155, 40 Sup. Ct. Rep. 82."

In *Corsicana National Bank* v. *Johnson*, 251 U. S. 68, 64 L. ed. 141, the court said:

> "The fact that the same persons were directors and managers of both corporations subjects their dealings *inter sese* to close scrutiny. That two corporations have a majority, or even the whole membership of their boards of directors in common, does not necessarily render transactions between them void; but transactions resulting from the agency of officers or directors acting at the same time for both must be deemed presumptively fraudulent unless expressly authorized or ratified by the stockholders."

In *City Trust Co.* v. *Bankers' Mortgage Loan Co.*, 102 Neb. 532, 167 N. W. 785, the court said:

> "The fairness of contracts between corporations having directors in common *must be shown* by *clear* and *convincing* proof, and it must be made to appear that they are *absolutely free from fraud.*"

In *Bridgens* v. *Dollar Sav. Bank*, 66 Fed. 12, Judge PHILLIPS, one of the ablest District Judges of the United States, said:

> "The bill of complaint alleges, and the demurrer admits, that one Brent was the president and one of the directors in the active management of the Citizens' Bank of Kansas City, Kan., and that through its officers and agents the defendant bank 'had full control and management of the business and affairs of said Citizens' Bank.' It further charges, and the demurrer

admits, that Brent, the president, and director of the Kansas bank, 'persuaded, induced, and compelled Charles S. Squier (cashier of the Citizens' Bank) to accede to said Brent's demand' to make the pretended contract and transfer of said stock in the Citizens' Bank, and to cancel the certificate of deposit held by the Citizens' Bank against the defendant bank. It is the settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interests of the two companies are opposed, nor will one corporation be permitted to form a company ancillary to the original one, and contract with it to the disadvantage of the creditors and stockholders of one of the companies. Mor. Priv. Corp., Secs. 529, 530. And a court of equity will, in such case, notwithstanding the apparent legal effect of such transfer and transaction between two such corporations, treat the same according to the real facts and equities of the case. *McVicker* v. *Opera Co.*, 40 Fed. 861; *Interstate Tel. Co.* v. *Baltimore & O. Tel. Co.*, 51 Fed. 49; *Trust Co.* v. *Kneeland*, 138 U. S. 414, 11 Sup. Ct. 357; *Day* v. *Telegraph Co.*, (Md.) 7 Atl. 608.

"Brent, as cashier of the one bank and president of the other, and the active manager of both, is presumed to have known of the financial condition and the insolvency of the Citizens Bank at the time of the transaction in question."

In *Bentley* v. *Zelma Oil Co.*, 76 Okl. 125, the court said:

"The law is averse to this character of contracts and presumes against their validity, while courts of equity look with suspicion upon them and will sustain them only upon clear proof of good faith and adequacy of consideration.

"'A contract between two corporations, effected by the votes of directors who are common to both, is presumptively invalid, and can only be sustained by an affirmative showing of fairness and good faith.' 10

Cyc. 819, par. 3—citing *German National Bank of Hastings* v. *First National Bank,* 55 Neb. 86, 75 N. W. 531; *Wheeler, et al.,* v. *Abilene National Bank Bldg. Co.,* 159 Fed. 391, 89 C. C. A. 477, 16 L. R. A. (NS) 892, and notes 892 to 895, 14 Ann. Cas. 917; 2 Pomeroy, Eq., (3d ed.) Sec. 958, pp. 1752, 1753; 6 R. C. L. 286, note; 14 Ann. Cas. 921, note; *Bear River Orchard Co.* v. *Hanley,* 15 Utah 506, 50 Pac. 611; *Hutchinson* v. *Sutton Mfg. Co.,* (C. C.) 57 Fed. 998; 2 Cook on Corporations, (6th ed.) sec. 653; *Mobile, etc.,* v. *Gass,* 142 Ala. 520, 39 South. 229; *Barry* v. *Moeller,* 68 N. J. Eq. 483, 59 Atl. 97; *Wardell* v. *R. R. Co.,* 103 U. S. 651, 26 L. ed. 509; 4 Clark & Marshall on Corporations, secs. 258-260, and cases cited.

"In the *Wardell* case, *supra,* which involved a character of transactions very similar to those involved here, Mr. Justice FIELD, who delivered the opinion of the Supreme Court of the United States, says:

> 'The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, *nor occupy a position in conflict with its interest.*'

"In *Stewart* v. *Lehigh R. R. Co.,* 38 N. J. Law. 505, the court said:

> 'The vice which inheres in the judgment of a judge in his own cause contaminates the contract; the mind of the director or trustee is the forum in which he and his *cestui que trust* are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced, that judgment must fail. *It matters not that the contract seems a fair one. Fraud is too cunning and evasive for courts to establish a rule that invites its presence'.*"

10 Cyc., page 819, says:

"A contract between two corporations, effected by

the votes of directors who are common to both, is presumptively invalid, and can only be sustained by an affirmative showing of fairness and good faith."

Globe Woolen Co. v. *Utica Gas,* 224 N. Y. 483 (1918), is a leading decision, in which plaintiff sued for specific performance of a contract to supply electric current. The defendant pleaded as a defense the fact that the contract was made under the dominating influence of a director who was common to both companies. The plaintiff owned mills and the defendant generated and sold electricity. One M. was the chief stockholder, a director and the president of the plaintiff, and was also the chairman of the Executive Committee of the defendant, but held only a qualifying share of stock in the defendant company. One G. was the superintendent and later the general manager of the electrical department of the defendant company. Protracted negotiations occurred between M. and G. concerning the substitution of electrical for steam power in the defendant company, which negotiations finally culminated in an agreement for such a substitution. The agreement provided for a maximum rate for electricity and a guaranteed saving of $300 a month on the cost of the heat, light and power used by the plaintiff company, the duration of the contract being for five years, with an option to renew for five years. M. presented the contract to the Executive Committee of the defendant, and a number of inquiries were made as to whether the contract was profitable. M. remained silent, but G. stated the contract was profitable. M. did not vote. The court held that the defense asserted by the defendant should be sustained, giving its reason, on pages 490 and 491, as follows:

"There was, then, a relation of trust reposed, of influence exerted, of superior knoweldge on the one side and legitimate dependence on the other *(Sage* v. *Culver,* 147 N. Y. 241, 247; *Davids* v. *Davids, supra).* At least,

a finding that there was this relation has evidence to sustain it. A trustee may not cling to contracts thus won, unless their terms are fair and just *(Crocker* v. *Cumberland Mining & Milling Co., supra,* and cases there cited; *Dougan* v. *MacPherson,* 1902, A. C. 197, 200; Thompson on Corp., 1228, 1231). His dealings with his beneficiary are 'viewed with jealousy by the courts, and may be set aside on slight grounds' *(Twin-Lick Oil Co.* v. *Marbury,* 91 U. S. 587, 588). He takes the risk of an enforced surrender of his bargain if it turns out to be improvident. There must be candor and equity in the transaction, and some reasonable proportion between benefits and burdens.

"The contracts before us do not survive these tests. The unfairness is startling, and the consequences have been disastrous."

SUB-POINT A.

Standard's alleged purchase from Deep Rock on October 1, 1925, of the Refining Company's stock (see Braheney's letter of December 22, 1925, Trustee's Exhibit "Eye," (R. Vol. 2, p. 606) and Deep Rock's two leases from the Refining Company should be adjudged fraudulent, null and void and the Deep Rock adjudged the owner of the 9,000 shares of the Refining Company stock.

(a) On the 31st day of July, 1926 (see Knourek's answer to the 79th interrogatory), the Standard charged Deep Rock on open account with the sum of $575,000.00, same being composed of the $225,000.00 for the last three months of 1925, and $50,000.00 for each of the first seven months of 1926. (See Tr. 426, etc., and Knourek's answer to the 64th and 69th interrogatories.) Thereafter Standard, on the last day of each of the *last five* months of 1926 charged Deep Rock with the rental under item entitled, "Balance assumed, $50,000.00," thus accounting for the charge of $825,000.00 shown in Exhibit "A" to Standard's claim. (Tr.

426 and Knourek's answer to the 97th interrogatory.) Thereafter Standard, on the last day of each month (Knourek's answer to the 33rd interrogatory) charged Deep Rock with $50,000.00 under book entries entitled Deep Rock O. & R. Co. balance assumed $50,000.00 down to and including January, 1928. (Knourek's answer to the 64th, 80th, and 97th interrogatories, and Tr. 617.) This made a total of $1,475,000.00 rental debits, $825,000.00 of which was paid on December 31, 1926, by Deep Rock's note of that date to Standard for $4,250,000.00, and the balance, $650,000.00, was paid in Deep Rock common stock in April, 1928, in settlement of Standard's open account balance against Deep Rock of $6,836,195.85 on February 24, 1928. (See last page of Knourek's answer to the 64th interrogatory.)

After the so-called April 12, 1928 settlement of Standard's open account of $6,836,195.85, *as of February 24, 1928,* Standard charged Deep Rock on open account $50,000.00 a month rental. Deep Rock made payments by its checks for the months of May, June, July, August, September and October, 1928, totaling $300,000.00, which Standard credited as rental payments. (See Knourek's answer to the 33rd interrogatory and Kerr's answer to the 26th interrogatory.) Standard also credited Deep Rock with payments on rentals as follows: On November 30, 1932, $50,000.00, on December 31, 1932, another $50,000.00 by its check, and by its check dated January 31, 1933, $50,000.00, and on February 25, 1933, *just three days before receivership,* another $50,000.00 rental, making a total of $500,000.00.

DEEP ROCK CREDITS.

(1) Entire rental charges disallowed....$4,525,000.00

(b) Interest Adjustments.

Item (1) *Interest on paid rentals.*

As shown by Knourek's answer to the 33rd interroga-

tory there was $300,000.00 in rental paid in 1928, upon which compound interest at the rate of 7 per cent was charged, as shown by Knourek's answer to the 99th interrogatory, as follows:

(a) $50,000.00 May 31, 1928 rental charge to June 9, 1928	$ 87.50
(b) $50,000.00 June 30, 1928 rental charge to July 16, 1928	155.56
(c) $50,000.00 July 31, 1928 rental charge to August 9, 1928	87.50
(d) $50,000.00 August 31, 1928 rental charge to October 1, 1928	301.45
(e) $50,000.00 September 29, 1928 rental charge to November 15, 1928	457.91
(f) $50,000.00 October 31, 1928 rental charge to December 3, 1928	321.00
Total	$1,410.92

(Knourek's answer to the 99th interrogatory.)

There was no interest charged on the $100,000.00 rental paid in November and December, 1932, and the $100,000.00 rental paid in January and February, 1933.

Item (2) *Interest on rentals liquidated by Deep Rock's note of December 31, 1926, for $4,250,000.00 paid in April, 1928, in common stock.* (R. Vol. 2, pp. 131 to 136.)

There should be computed and disallowed the 7 per cent compound interest Standard charged Deep Rock as Refining Company rentals charged during the year 1926, to-wit:

(a) $575,000.00 from July 31, 1926, to December 31, 1926	$16,967.64
(Knourek's answer to the 79th interrogatory.)	
(b) $50,000.00 August 31, 1926 rental charge to December 31, 1926	1,176.92

(c) $50,000.00 September 30, 1926 rental charge to December 31, 1926.....	880.11
(d) $50,000.00 October 30, 1926 rental charge to December 31, 1926.....	585.03
(e) $50,000.00 November 30, 1926 rental charge to December 31, 1926.....	291.67
(f) $50,000.00 December 31, 1926 rental charge to December 31, 1926.....	None
Total.....	$19,901.37

(Knourek's answer to interrogatories Nos. 80 to 97.)

Item (3) *Interest in open account paid by common stock in April, 1928.*

There should be computed the 7 per cent compound interest *included* on rentals in Standard's open account balance of $6,836,195.85 on February 24, 1928, and paid in April, 1928.

(a) $50,000.00 January 31, 1927 rental charge to February 24, 1928.....	$ 3,864.70
(b) $50,000.00 February 28, 1927 rental charge to February 24, 1928.....	3,552.32
(c) $50,000.00 March 31, 1927 rental charge to February 24, 1928.....	3,241.74
(d) $50,000.00 April 30, 1927 rental charge to February 24, 1928.....	2,932.96
(e) $50,000.00 May 31, 1927 rental charge to February 24, 1928.....	2,625.97
(f) $50,000.00 June 30, 1927 rental charge to February 24, 1928.....	2,320.78
(g) $50,000.00 July 30, 1927 rental charge to February 24, 1928.....	2,017.34
(h) $50,000.00 August 31, 1927 rental charge to February 24, 1928.....	1,715.66
(i) $50,000.00 September 30, 1927 rental charge to February 24, 1928.....	1,415.74

(j) $50,000.00 October 31, 1927 rental charge to February 24, 1928..... 1,117.55

(k) $50,000.00 November 30, 1927 rental charge to February 24, 1928..... 821.09

(l) $50,000.00 December 31, 1927 rental charge to February 24, 1928..... 526.36

(m) $50,000.00 January 31, 1928 rental charge to February 24, 1928..... 233.33

Total.....$26,385.54

(Knourek's answer to interrogatories Nos. 80 to 97.)

Item (4) *Interest on unpaid rentals.*

Standard charged Deep Rock $50,000.00 rental (not paid) on the last day of the following months with 7 per cent compound interest thereon, which interest Deep Rock is entitled to have disallowed in full.

1928

(a) $50,000.00 February 29, 1928, to February 24, 1933.....$ 20,799.06

(b) $50,000.00 March 31, 1928, to February 24, 1933..... 20,388.45

(c) $50,000.00 April 30, 1928, to February 24, 1933..... 19,980.22

(d) $50,000.00 November 30, 1928, to February 24, 1933..... 17,188.23

(e) $50,000.00 December 31, 1928, to February 24, 1933..... 16,798.57

1929

(a) $50,000.00 January 31, 1929, to February 24, 1933..... 16,411.10

(b) $50,000.00 February 28, 1929, to February 24, 1933..... 16,026.07

(c) $50,000.00 March 30, 1929, to February 24, 1933..... 15,655.81

(d) $50,000.00 April 30, 1929, to February 24, 1933	15,262.40
(e) $50,000.00 May 31, 1929, to February 24, 1933	14,883.91
(f) $50,000.00 July 15, 1929, to February 24, 1933	14,320.34
(g) $50,000.00 July 31, 1929, to February 24, 1933	14,133.51
(h) $50,000.00 August 31, 1929, to February 24, 1933	13,761.57
(i) $50,000.00 September 30, 1929, to February 24, 1933	13,391.78
(j) $50,000.00 October 31, 1929, to February 24, 1933	13,024.14
(k) $50,000.00 November 30, 1929, to February 24, 1933	12,658.63
(l) $50,000.00 December 31, 1929, to February 24, 1933	12,295.24
1930	
(a) $50,000.00 January 31, 1930, to February 24, 1933	11,933.96
(b) $50,000.00 February 28, 1930, to February 24, 1933	11,574.77
(c) $50,000.00 March 31, 1930, to February 24, 1933	11,217.67
(d) $50,000.00 April 30, 1930, to February 24, 1933	10,862.64
(e) $50,000.00 May 31, 1930, to February 24, 1933	10,509.67
(f) $50,000.00 June 30, 1930, to February 24, 1933	10,158.75
(g) $50,000.00 July 31, 1930, to February 24, 1933	9,809.85
(h) $50,000.00 August 30, 1930, to February 24, 1933	9,474.49
(i) $50,000.00 September 30, 1930, to February 24, 1933	9,118.12

(j) $50,000.00 October 31, 1930, to February 24, 1933	8,775.27
(k) $50,000.00 November 30, 1930, to February 24, 1933	8,434.41
(l) $50,000.00 December 29, 1930, to February 24, 1933	8,118.07
1931	
(a) $50,000.00 January 31, 1931, to February 24, 1933	7,758.59
(b) $50,000.00 February 27, 1931, to February 24, 1933	7,434.74
(c) $50,000.00 March 31, 1931, to February 24, 1933	7,090.59
(d) $50,000.00 April 30, 1931, to February 24, 1933	6,759.50
(e) $50,000.00 May 29, 1931, to February 24, 1933	6,452.22
(f) $50,000.00 June 30, 1931, to February 24, 1933	6,103.05
(g) $50,000.00 July 31, 1931, to February 24, 1933	5,777.68
(h) $50,000.00 August 31, 1931, to February 24, 1933	5,454.19
(i) $50,000.00 September 30, 1931, to February 24, 1933	5,132.59
(j) $50,000.00 October 31, 1931, to February 24, 1933	4,812.8
(k) $50,000.00 November 30, 1931, to February 24, 1933	4,494.9
(l) $50,000.00 December 30, 1931, to February 24, 1933	4,189.4
(a) $50,000.00 January 30, 1932, to February 24, 1933	3,875.1
(b) $50,000.00 February 29, 1932, to February 24, 1933	3,552.3
(c) $50,000.00 March 31, 1932, to February 24, 1933	3,241.7

(d) $50,000.00 April 30, 1932, to February 24, 1933	2,932.96
(e) $50,000.00 May 31, 1932, to February 24, 1933	2,625.98
(f) $50,000.00 June 30, 1932, to February 24, 1933	2,320.78
(g) $50,000.00 July 30, 1932, to February 24, 1933	2,027.41
(h) $50,000.00 August 31, 1932, to February 24, 1933	1,715.67
(i) $50,000.00 September 30, 1932, to February 24, 1933	1,415.75
(j) $50,000.00 October 31, 1932, to February 24, 1933	1,117.55
Total	$483,252.36

(Knourek's answer to the 99th interrogatory.)

The above interest should be disallowed, as follows:

Item (1)—pages 171-172 herein	$ 1,410.92
Item (2)—pages 172-173 herein	19,901.37
Item (3)—pages 173-174 herein	26,385.54
Item (4)—pages 174-177 herein	483,252.36
Total	$530,950.19

The above figures are based on Knourek's answers to the 79th, 80th to 97th, and 99th interrogatories, and being in detail, should be accepted instead of Knourek's estimate of $504,590.95 contained in his answer to the 45th interrogatory.

The above sum of $530,950.19 constitutes a part of the $4,819,222.07, being the 15th item of charges in Exhibit "A" to Standard's claim, entitled "Interest on Open Account Balances." As the Deep Rock never owed these rentals, the above sum of $530,950.19 was a wrongful and unjustified debit.

Resume' of rental charges with 7 per cent compound interest.

Viewing the rental charges separate and distinct from all other debits and assuming the 7 per cent compound interest is allowable on just balances, the Deep Rock is then entitled to not only deduct the entire $4,525,000.00 rental charges, but also deduct the 7 per cent interest charged on the $4,525,000.00 rental. With respect to that single item—the rentals and 7 per cent interest—we would have the following:

(1) Standard's balance on open account up to February 28, 1933, after allowing Deep Rock credit of $1,975,000.00 wrongful rental payment.....	$ 9,342,642.37

DEEP ROCK CREDITS:

(1) The entire rental charges disallowed.	$ 4,525,000.00
(2) The 7 per cent compound interest on rentals.....	530,950.19
Total deductions.....	$ 5,055,950.19

(NOTE: But we insist the only rate of interest chargeable is 5 per cent per annum and an account stated on a 5 per cent per annum basis will be found set forth herein beginning on page 322, etc.)

Unearned discount on $4,250,000.00 note.

The $4,250,000.00 Deep Rock five-year 6 per cent note executed December 31, 1926, maturing December 31, 1931 was discounted by the Standard in the amount of $170,000.00, which is equivalent to 4/5ths of 1 per cent per annum, for the five-year period of duration. That is to say only $4,080,000.00 was credited to Deep Rock's account. (See credit sheet of Exhibit "A" to Standard's claim, and Knourek's testimony, Tr. 567; also Tr. 531, 384 and 308.) Before

the application of this credit of $4,080,000.00 on the note, Deep Rock was indebted to Standard in the sum of $1,748,-674.47 on December 31, 1926. This left a balance after crediting the note in favor of the Deep Rock in the sum of $2,331,325.53. (Tr. 567) During the existence of this balance in favor of the Deep Rock, Standard credited Deep Rock with 7 per cent interest, computed monthly, in the total sum of $8,848.30. (Tr. 531) This constituted all the interest Standard ever paid Deep Rock on the balance on open account. (Tr. 567) This note was paid on April 12, 1928, 1 year, 3 months and 12 days after maturity. (Tr. 567, and last page of Knourek's answer to the 64th interrogatory.) The earned discount during the 1 year, 3 months and 12 days, that is, from December 31, 1926, to April 12, 1928, was $45,699.66, leaving an unearned discount of $124,300.34. This calculation is approximate as it is not made by days, but by 1 year, 3 months and 12 days in April, 1928. Photo copy of this note will be found in Exhibit "B" to Knourek's answer to the 31st interrogatory. The 6 per cent interest provided for in the note was payable quarterly. The quarterly interest was charged to the Deep Rock up to April 12, 1928, in the total sum of $331,500.00, as shown by the endorsements on the back of the note.

On account of the fiduciary relation between the Deep Rock and the Standard, the Deep Rock should have been credited with the unearned discount in the approximate sum of $124,300.34.

POINT TWO.

The interest charge of $4,819,222.07 on open account balances was excessive and illegal in the sum of $2,-295,192.14, as hereinafter calculated on pages 323 to 325 herein.

It is clear from the evidence that the loans, advances

and charges made by Standard and charged on open a count against Deep Rock were Illinois transactions and th the alleged contract to pay interest at 7 per cent on dai balances was (a) *an Illinois contract* (b) *to be performed payment in Illinois.* The following facts show that the ra of interest is controlled by the Illinois statutes and that per cent is the maximum:

(a) The Standard never at any time complied wi Section 43 of Article 9 of the Oklahoma Constitution pr hibiting foreign corporations from doing business in Okl homa without first filing in the office of the Corporati Commission a list of its stockholders, officers and directo with the residence and postoffice address of, and the amou of stock held by each, and has never complied with the pr visions of that section of the Constitution requiring forei corporations to designate a resident agent upon whom ser ice of summons or legal notice may be had. Standard nev complied with Section 5432, Comp. Okla. Stats. 1921, pr hibiting foreign corporations from doing business in Okl homa prior to the filing in the office of the Secretary of Sta a certified copy of its charter or articles of incorporati and appointing a resident agent upon whom service of pr ess may be had, as required by Section 5433, Comp. Ok Stats. 1921.

The Oklahoma statutes prescribe two penalties for foreign corporation carrying on business without havi complied with the constitution and statutes. Section 54 Comp. Okla. Stats. 1921, renders void "its contracts wi citizens of this state"—Oklahoma. As the Deep Rock is n a citizen of Oklahoma, although admitted to do business Oklahoma, it could not plead the invalidity of the contra and transactions had between it and the Standard if th took place in Oklahoma. Section 5438, Comp. Okla. Sta 1921, provides that "No foreign corporation, as above

fined, which shall fail to comply with this article, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort."

If the Standard was transacting business in Oklahoma in violation of the statutes, the only penalty against it would be *(a)* an ouster from the state in an action by the Attorney General on behalf of the state, or an injunction in a suit by the state restraining it from carrying on business (Fletcher Cyc., Corporations, Perm. Ed., Vol. 17, Sec. 8518), and *(b)* no access to the courts of Oklahoma to recover on any contract or cause of action lying in tort.

However, it is clear that *if* the numerous transactions between the Standard and the Deep Rock took place in Oklahoma, they constituted doing business in Oklahoma.

—*Hemphill* v. *Orloff*, 277 U. S. 537, 72 L. ed. 978;
Chattanooga National Building & Loan Assn. v. *Denson*, 189 U. S. 408, 47 L. ed. 870;
Schiller Piano Co. v. *Hyde*, 43 S. D. 581, 181 N. W. 196.

In the absence of affirmative proof that the transactions between the Deep Rock and the Standard, set forth in Standard's claim, actually took place in Oklahoma, the presumption is that the transactions, loans, notes, etc., were not made in Oklahoma because if made in Oklahoma they convict the Standard of violating the constitution and statutes of Oklahoma. It is well settled that there is no presumption that an individual officer or a corporation violates the law of the state.

In *The Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 69, 70, 6 L. ed. 554, the court said the law

"presumes that every man, in his private and official character, does his duty, until the contrary is proved;

it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemnitur esse acta, donec probetur in contrarium.* Thus, it will presume that a man acting in a public office has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance, if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable Treatise on Evidence, 3 Starkie's Evid., part iv, 1234, 1241, 1248 and note 1250, etc.

"The same presumptions are, we think, applicable to corporations."

In *Central Grain & Stock Exch.* v. *Board of Trade,* 123 Fed. 463, 466, the Seventh Circuit Court of Appeals in a case involving the question as to whether a foreign corporation was doing business in Illinois, said:

"The defendant below was a corporation of the State of Delaware. There could be no presumption of its presence within the State of Illinois."

(b) The Deep Rock has maintained offices in Chicago since its organization and most of the time maintained in the same building with the Standard. (Tr. 137-138) H. C. Cummins was President of the Deep Rock from June, 1922 to June, 1924, during which time Deep Rock's offices were in Chicago in the same building across the hall from Standard and part of the time across the street. (Tr. 137) He was succeeded as President by John J. O'Brien, who has continuously been President since that time, with offices in Chicago. (Tr. 135, 137, 54 and 153)

(c) After offices were opened in Tulsa in charge of Mr. Gray and Mr. Francisco, the Gray Committee (Tr. 181) would go to Chicago practically every month for conferences with the Standard officials in regard to finances and other matters of business. (Tr. 97, 154, 155 and 171) The Deep Rock's financial needs would be submitted to the Standard officials at these monthly meetings in the Standard's Chicago offices. Sometimes a budget was submitted. There in Chicago it was agreed by and between Standard and Deep Rock that Standard would loan Deep Rock the money and would thereupon deposit the money to Deep Rock's credit in Chicago banks and Deep Rock's checks payable to Standard as credits on account on notes were drawn on Chicago banks. Deep Rock did not make payments in money. (Tr. 154 and 160 and Lynch, Tr. 629 to 632; Knourek, Tr. 568 and 612.)

(d) 75 per cent of Deep Rock's bank deposits were carried in Chicago banks, about 20 per cent in Tulsa banks, and about 5 per cent in Omaha, Nebraska, banks. (Tr. 172)

(e) Standard officials, as also Deep Rock officials, had authority to sign checks on the Deep Rock's bank account (Tr. 173 and 375) and did draw such checks. (See Exhibit 3 to Francisco's answer to the 13th interrogatory and Exhibit "B" to Knourek's answer to the 31st interrogatory, and Tr. 173-175.)

(f) All the meetings of the Deep Rock's Board of Directors were held in Chicago (Tr. 171) and the minute books of its directors' and stockholders' meetings were kept in Chicago. (Tr. 186)

(g) The Standard itself paid the interest on the Deep Rock's bonded indebtedness and charged the same to the Deep Rock. (Tr. 340) This was done in Chicago.

(h) The Standard deposited in Chicago and New York

banks the Deep Rock sinking fund requirements and charged the same to Deep Rock. (Tr. 344, 345, etc.) All this was done in Chicago.

(i) The Standard received $9,395,151.80, the net proceeds of the sale of the March 1, 1928 $10,000,000.00 Deep Rock notes, and applied the proceeds to the payment of the balance of the first mortgage bonds, with interest and premium, in the sum of $1,922,110.23 and the redemption of $7,500,000.00 Deep Rock's two-year 6 per cent notes due April 15, 1928, with interest thereon. (See 9th item on page 3 of Exhibit "A" to Standard's claim, and Tr., pages 310, 362 and 363.) That was all done in Chicago.

(j) Standard never actually paid Byllesby Engineering and Management Corporation "sundry charges," $230,463.16, or for "supervision fees," $1,219,034.83, but credited the Engineering and Management Corporation therewith and charged the same to Deep Rock. (Knourek's answer to the 30th interrogatory and Tr. 525 and 543.) It was a mere bookkeeping set-up.

(k) Standard from time to time paid Deep Rock's debts and charged the same to Deep Rock's account. (Tr. 346, 349, 355 and 360) Standard paid direct or deposited to the Deep Rock's credit in banks in Chicago and New York dividends distributed to stockholders other than the Standard, and the Standard thereupon charged the dividends thus paid to Deep Rock's account. This also took place in Chicago, and not in Oklahoma. (Tr. 349, 350, 351, 352, 353 and 354)

(l) Standard paid federal government normal tax on Deep Rock's bonds and charged the same to Deep Rock. (Tr. 366) This was done in Chicago.

(m) The 14th item on the first page of Exhibit "A" to Standard's claim, $1,087,569.57, listed as "Sundry Ex-

penditures," was paid by Standard for Deep Rock and charged by Standard to Deep Rock. (Tr. 365 and 371; Knourek's answer to the 21st interrogatory.) The larger items went to Wheeling Steel Corporation and for pipe purchased by the Standard for the Deep Rock and charged to the Deep Rock by the Standard. (Tr. 370, 371) Also for other material purchased by Standard for the Deep Rock and charged to the Deep Rock. This item of "Sundry Expenditures" included normal taxes on Deep Rock's bonds, $10.00 rental on Deep Rock's safety deposit box in the vaults of the Continental and Commercial Safe Deposit Company of Chicago, services of transfer agents, services of registrar, trustees' services, refunds of state taxes and other bond and note issues, and representation service of the Corporation Trust Company; also cost of printing dividend checks and listing Deep Rock's preferred stock on the Chicago stock exchange; also a portion of the fees paid Haskins & Sells, Standard auditors, for auditing the books of the Standard and its subsidiary corporations. (Tr. 366 and 367, and Knourek's answer to the 21st interrogatory.) All this took place in Chicago.

(n) The Deep Rock could not pay Standard in Oklahoma because Standard could not be found in Oklahoma. Standard had no agent in Oklahoma (except the Deep Rock) authorized to accept payment from Deep Rock, and it would be absurd to assume that the Deep Rock had authority to act as Standard's agent in accepting payment from itself for Standard. That is, the Deep Rock was not authorized to occupy the dual capacity as principal for itself and agent for Standard in accepting for Standard payments made for Standard.

(o) There seems to have been no actual contract to pay seven per cent interest, but Lynch told Gray in *Chicago* that Standard would advance money on open account at seven

per cent, to which Gray tacitly consented. (Lynch, Tr. 282-283.)

(p) There was no written contract to pay seven per cent interest. (Lynch, Tr. 632.)

Illinois law controls interest rate.

It is well settled by the authorities that the law of the state where a contract is made and is to be performed determines the interest rate that may be contracted for or recovered.

Federal courts in Oklahoma take judicial notice of Illinois statutes: 255 U. S. 52, 65 L. ed. 497; 245 Fed. 46; 218 Fed. 574; 293 Fed. 58; 203 Fed. 82; 94 Fed. 575; 217 Fed. 217; Simpkins Federal Practice, Revised 1934 ed., page 764.

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 61 L. ed. 1206-1212, Mr. Justice BRANDEIS said:

> "The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state."

The court cites *Scotland County* v. *Hill*, 132 U. S. 107, 117, 33 L. ed. 261, 265.

See, also:

De Wolf v. *Johnson*, 10 Wheat. 367, 6 L. ed. 343;

Coghlan v. *South Carolina R. Co.*, 142 U. S. 101, 35 L. ed. 951;

Building & Loan Ass'n v. *Logan*, (5th Cir. Apps.) 66 Fed. 827;

Cubbedge, Hazlehurst & Co. v. *Napier*, 62 Ala. 518;

Gray, Governor, v. *The State, ex rel. Coghlen*, 72 Ind. 567;

United States v. *Mittry Bros. Const. Co.*, 4 F. Suppl. 216;

Kavanaugh v. *Day*, 10 R. I. 393;
Wharton on Conflict of Laws, 3rd ed., Vol. 2, Sec. 513-A;
Clark v. *Belt*, (8th Cir. App.) 233 Fed. 577.

In *Coghlan* v. *South Carolina R. Co.*, 142 U. S. 101, 35 L. ed. 951, it appears that the Railroad Company issued its bonds and coupons in South Carolina, payable in England, and the question arose as to whether or not the laws of England or South Carolina determined the rate of interest recoverable. Mr. Justice HARLAN reviewed the American and English authorities and said:

"All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in the view of the parties when the contract was executed. For, as said by Chief Justice MARSHALL in *Wayman* v. *Southard*, 23 U. S. 10 Wheat. 1, 48 (6:253, 264), it is a principle, universally recognized, that 'in every forum a contract is governed by the law with a view to which it was made.' And by Lord MANSFIELD, in *Robinson* v. *Bland*, 2 Burr. 1077, 1078: 'The parties had a view to the law of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed. Now here the payment is to be in England: it is an English security and so intended by the parties.' Referring to these and many other cases, this court, speaking by Mr. Justice MATTHEWS, held, upon full consideration, in *Pritchard* v. *Norton*, 106 U. S. 124, 136 (27: 104, 108), that the law, upon which the nature, interpretation, and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligation. This doctrine was reaffirmed in *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 458 (32:788, 798), where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, 'that the nature, the obligation,

and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view.' The elaborate and careful review of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject.

"What law, then, did the parties have in view as determining the legal consequences resulting from the nonperformance of the contract between them? Presumptively, the law of England, where the contract was to be entirely performed. *The bonds and coupons were to be presented and paid there, and not elsewhere.* They were to be paid in pounds sterling at a designated house in London. The fair inference is that the railroad company negotiated the bonds abroad, and made them payable in that city, in order to facilitate a sale of them to foreign buyers. Every circumstance connected with the contract tends to show that the parties intended that all questions in respect to performance or the legal consequences of a failure to perform, were to be determined by the law of the place, and the only place, where the obligation to make payment could be discharged, and where the breach of that obligation would occur, if payment was not made at the appointed time and place. In this view of the contract, the rate of interest, after the maturity of the obligations, was not determinable by the law of South Carolina. This is abundantly established by the authorities.

"In *De Wolf* v. *Johnson*, 23 U. S. 10 Wheat. 367, 383 (6:343, 347), the court said: 'The legal fulfillment of a contract of loan, on the part of the borrower, is *repayment* of the money, and the security given is but the means of s e c u r i n g what he has contracted for, *which, in the eye of the law, is to pay where he borrows*, unless another place of payment be *expressly* designated by the contract.' In *Andrews* v. *Pond*, 38 U. S. 13 Pet. 65, 77 (10:61, 66), Chief Justice Taney, speaking for the court, said: 'The general principle in relation to

contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest without incurring the penalties of usury.' So, in *Carnegie* v. *Morrison*, 2 Met. 381, 397, Chief Justice SHAW, after stating the general rule to be that the *lex loci contractus* determines the nature and legal quality of the act done, whether it constitutes a contract, etc., said: 'But a contract, made in one country, may contemplate the execution of deeds, or other contracts, making payments or doing other legal acts, in another; in regard to which, the law of the foreign country, where the act is to be done, will govern the contract.' In *Cooper* v. *Waldegrave* 2 Beav. 282, 284—which was an action against the acceptor of bills of exchange, drawn in Paris, where the drawer and acceptor were at the time resident, and made payable in London—the bills, on their face, did not state any particular rate of interest. Lord LANGDALE, Master of the Rolls, after observing that the law of the country where a contract, merely personal, is made, determines its validity and interpretation, while the law of the forum regulates the mode of suing, and the time within which suit must be brought for non-performance, said: 'The contract of the acceptor, which alone is now to be considered, *is to pay in England;* the non-payment of the money when the bill becomes due is a breach in England of the contract which was to be performed in England. Upon the breach, the right to damages or interest immediately accrues; interest is given as compensation for the non-payment in England and for the delay of payment suffered in England: and I think that the law of England, that is, the law of the place where the default has happened, must govern the allowance of interest which arises out of that default.' See also *Boyce* v. *Edwards*, 29 U. S. 4 Pet. 111, 123 (7:799, 803); *Miller* v. *Tiffany*, 68 U. S. 1 Wall. 298, 310 (17:540, 543); *Scudder* v. *Union Nat. Bank of Chicago*,

91 U. S. 406, 412 (23:245, 248); *Scotland County* v. *Hill*, 132 U. S. 107, 116 (33:261, 265); Story, Confl. L., Sec. 291; 2 Kent. Com. 459, 460, 461; *Scofield* v. *Day*, 20 Johns. 101; *Dickinson* v. *Edwards*, 77 N. Y. 573; *Frees* v. *Brownell*, 35 N. J. L. 285, 287; *Peck* v. *Mayo*, 14 Vt. 33, 38; *Ex parte Heidelback*, 2 Low. 526, 530; *Hunt* v. *Hall*, 37 Ala. 702, 704; *Arnold* v. *Potter*, 22 Iowa 194, 198."

It is clear from the evidence in this case that the contract for the loans and advances made by the Standard to the Deep Rock was made in Chicago.

In *P. Ballantine & Sons* v. *Fenn*, 88 Vt. 166, 92 Atl. 3, the court said:

"The record shows that the orders for intoxicating liquors were sent by the purchaser, Frederick Fenn, by mail or by telegraph from Rutland, this state, to New York City, and that the goods so ordered were shipped to him on such orders, he paying the freight, all in *accordance with a previous arrangement entered into between him and the petitioner in the City of New York*. Clearly the place of the contract was in New York. *Tuttle & Reed* v. *Holland*, 43 Vt. 542; *Backman* v. *Mussey*, 31 Vt. 547; *Bacon* v. *Hunt & Co.*, 72 Vt. 98, 47 Atl. 394. This case is distinguishable from that of *Beverwick Brewing Co.* v. *Oliver*, 69 Vt. 323, 37 Atl. 1110. There the goods were ordered by the purchaser at Burlington, this state, of the seller in Albany, N. Y., by letter or telegraph, pursuant to a previous arrangement *made in this state*, and it was held that the contract was partly made here and therefore that it was unenforceable. Nor does the fact that security, by way of a mortgage or mortgages, was taken in this state, in terms broad enough to cover payments of indebtedness for goods purchased and any other indebtedness of the purchaser to the petitioner, operate to make the contract of sale of liquors, ordered and shipped as aforesaid, a contract wholly or in part made in Vermont. *De Wolf* v. *Johnson*, 10 Wheat. 367, 6 L. ed. 343."

In *Clark* v. *Belt*, 233 Fed. 577, the Eighth Circuit Court of Appeals said:

"The test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place the contract became existent, and became existent at the place where the act was done. Until then there was no contract. 2 Wharton on the Conflict of Laws (3d ed.), sec. 422a. Tested by this rule, this was an Iowa contract. Clark ratified the act of his agent only upon the condition that Belt should agree to something further, to-wit, the advancement in July, 1908, of $800 toward the purchase money. Until this was accepted by Belt there was no contract. The findings show that Belt at all times during 1908 resided in Iowa, so that presumably any acceptance by him was in Iowa, and thus the contract was born in Iowa. The same result is reached by testing the matter from the standpoint of where the obligation was to be performed, for this, as to the effect of a breach is the material consideration where the performance is to be at a place different from the place of the contract. In *Scudder* v. *Union National Bank*, 91 U. S. 406, 23 L. ed. 245, it is said:

> 'Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. *Andrews* v. *Pond*, 13 Pet. 65 (10 L. ed. 61).'

"The performance by Clark, for the default of which he became liable in damages to Belt, was the delivery of a deed to Belt. As above stated Belt was a resident of Iowa all through 1908, so that the delivery to him was there, and the performance by Clark was

thus to be in Iowa. So that, from either standpoi whether the place of the making of the contract, or place of performance, its *locus* was in Iowa.

"If, as we have seen, this be an Iowa contract, th the South Dakota statute upon the measure of dama is to be eliminated from consideration, and we m seek elsewhere for the ruling fixing the amount. Th is no statute in Iowa upon the subject."

Presumption place of contract and performance same.

Assuming that there was no express agreement as where the Deep Rock should repay the money the presu tion is conclusive that Chicago was the place of paym and therefore the place of performance.

As said in Wharton on Conflict of Laws, 3rd Ed., Vol Sec. 513-A, "In accordance with this principle, it is h that the right to, and the rate of, interest on bonds or c pons after maturity is to be determined by the law of place of payment."

Thus in *De Wolf* v. *Johnson*, 10 Wheat. 367, 6 L. ed. 3 347, the court announced the rule in the following unambi ous language:

"With regard to the locality of the contract of 18 we have no doubt that it must be governed by the l of Rhode Island. The proof is positive that it was tered into there, and there is nothing that can rais question but the circumstance of its making a part the contract, that it should be secured by conveyan of Kentucky land. But the point is established, that mere taking of foreign security does not alter the loc ity of the contract with regard to the *legal interest*. T ing foreign security does not necessarily draw after the consequence that the contract is to be fulfilled wh the security is taken. The legal fulfillment of a contr of *loan*, on the part of the borrower, *is repayment of*

money, and the security given is but the means of securing what he has contracted for, which, *in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract.* No tender would have been effectual to discharge the mortgage unless made in Rhode Island. On a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender."

The above decision of the Supreme Court of the United States was followed by the Court of Appeals of New York in a case in which the English and American authorities were fully cited and reviewed. In the New York case, *Weyand* v. *Park Terrace Co.,* 101 N. Y. 231, 95 N. E. 723, 36 L. R. A. (NS) 308, it appears that the plaintiffs conveyed to the defendant certain real estate in Queens County, New York, and took from the conveyee a bond of $11,000.00 with a mortgage as collateral security. By the terms of the bond and mortgage they were payable by Randall on February 13, 1910, with interest to be computed from February 13, 1907, at the rate of five and one-half per cent per annum. As said by the court, "No place for the payment of interest or principal was expressly stated in the bond or mortgage." The creditor was at all times subsequent to the date of execution of the bond and mortgage in 1907 a resident citizen of Waterbury, Connecticut, with no agent in New York authorized to receive payment. The court held that the contract having been made in New York and no place of payment having been designated, New York was likewise the place of performance—payment. The New York Court of Appeals said:

"The fact that contracts between residents of different states and countries are and have been for many years very numerous, and that there are comparatively few reported decisions affecting the question involved in this action, indicates that there have been for a long period of time generally recognized rules governing the

place where payments pursuant to contract must be made.

"The intention of the parties to a contract as to the place where payments are to be made usually appears by express provision or necessary inference in the contract itself. In cases where the intention does not thus appear, the rules governing the place of such payments are not so important as that they shall be certain, and not shifting or subject to misunderstanding. The rules heretofore established and asserted are therefore important to determine what decision should be made in this case. The subject of the place of payment was discussed to some extent by ancient writers, and there are a few reported cases in which the question has been considered, from some of which we will quote. * * *

"The common-law rule in England did not in any way prevent making a contract expressly stating where the obligation should be performed, and in a case where a contract was made out of the Kingdom, it was by the English courts, in the absence of an express agreement, held that the intention of the parties was to perform the contract at the place in which the contract was made. In *Fessard* v. *Mugnier*, 18 C. B. N. S. 286, the chief judge, delivering the opinion of the court, said: 'The authorities seem to me to establish this distinction: That if the plaintiff was in England when the contract was made, and went beyond the seas afterwards, the law would not cast upon the defendant the duty of following him for the purpose of paying or tendering the money. The contract in that case would be construed to mean that the debtor would on the day named pay the creditor the money, provided he was then in England ready to receive it. But where, as here, the contract was made in Paris, and the plaintiff was residing in Paris at the time of the execution of the deed, and at the time of its registration, his absence abroad affords no excuse for the defendant's not tendering him the money.' It will be seen that the place of making the contract, and not the residence of the creditor, deter-

mines whether the debtor is required to seek the creditor beyond the bounds of the Kingdom to make payment of the obligation.

"It is always competent for the parties to a contract to provide thereby in express terms the place where payments which shall become due thereon are to be made. ***While it is a rule of quite general acceptation that a debtor must seek his creditor to pay his indebtedness,*** it is always open to the parties to show by the *express terms* of the contract, or by fair inference therefrom, that it was the intention of the parties to pay at a particular place or within a particular state or country. The state or country in which the contract is made has an important, or perhaps *controlling* bearing in determining whether a debtor is required to go beyond the bounds of the state or country of his residence to make payments upon the contract.

"In *De Wolf* v. *Johnson*, 10 Wheat. 367, 6 L. ed. 343, a contract for the loan of money was made in Rhode Island, and secured by a mortgage upon real property in Kentucky. The court, referring to the contract, says: 'With regard to the locality of the contract of 1815, we have no doubt that it must be governed by the law of Rhode Island. The proof is positive that it was entered into there, and there is nothing that can raise a question but the circumstance of its making a part of the contract, that it should be secured by conveyances of Kentucky land. But the point is established that the mere taking of foreign security does not alter the locality of the contract with regard to the legal interest. Taking foreign security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract of loan, on the part of the borrower, is *repayment of the money*, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, *is to pay* where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgage, unless made in Rhode Island. On

a bill to redeem, a court of equity would not have listened to the idea of calling the mortgagee to Kentucky in order to receive a tender.' *Allshouse* v. *Ramsay*, 6 Whart. 331, 37 Am. Dec. 417. * * *

"The presumption that the parties to a contract intend that the borrower *shall pay where he borrows* has been quite generally sustained, at least to the extent of inferring an intent to pay within the state or country where the contract requiring the payment is made. It appears from the quotation from *Fessard* v. *Mugnier*, *supra*, that such is the rule in England. The case of *Chapman* v. *Robertson*, 6 Paige 627, 31 Am. Dec. 264, so far as it holds that the place where the mortgaged property is situated governs in determining the place of payment, as against the place where a loan is made which is secured by the mortgage on such property, has been frequently criticized. Story, Confl. L., 8th ed. 402; *Cope* v. *Alden*, 53 Barb. 350; 2 Kent's Com. 461, note b; *Curtis* v. *Leavitt*, 15 N. Y. 9, 89; *Dickinson* v. *Edwards*, 77 N. Y. 573, 33 Am. Rep. 671; *Manhattan L. Ins. Co.* v. *Johnson*, 188 N. Y. 108, 112, 9 L. R. A. (NS) 1142, 80 N. E. 658, 11 A. & E. Ann. Cas. 223. * * *

"In the *Taylor* v. *Blair* case there was an agreement in connection with the purchase of certain shares of stock, that, at the end of one year from the date of the purchase, if the plaintiff's intestate desired to sell the shares at the price paid for them, the defendants would purchase the same, and pay to the plaintiff's intestate the amount paid by him for the same, with interest. It was in that action held that it was incumbent upon the plaintiff to tender a transfer of said shares to the parties agreeing to purchase the same. The defendants, at the time the contract was made and at the time when it was necessary to make the tender, resided in Pennsylvania, but the corporation whose stock was under consideration had an office in the City of New York, and one of the defendants, the president of said corporation, and the other of the defendants, one of its trustees, made the office of said corporation their head-

quarters in New York, and the case holds that nothing relieved the plaintiff's intestate from making a tender or offer of the shares of stock to the defendants personally at their place of residence *in the State of Pennsylvania,* or at their office in the City of New York. * * *

"The rules relating to the place where payments should be made upon contract have been established by long usage, and can be stated briefly as follows:

"(1) *It is a general rule that a debtor must seek his creditor to make payment of his indebtedness.*

"(2) *The parties to a contract may provide therein where payments thereon shall be made.*

"(3) *Where a contract is made outside of the state in which the promisor resides, and it does not, either by express terms or by fair inference, provide where the same is to be performed, it will be presumed that the parties intend that it shall be performed at the place where it is made, and the promisor must provide at such place to make the payments thereon.*

"(4) *Where a contract is made in this state, either with a person then a resident of this state, who afterwards removes therefrom, or with a nonresident of this state, it is the duty of the promisee to provide a place in this state where payments can be made, and it is not necessary for the debtor to go beyond the bounds of this state to make payments thereon.*"

The above case was cited and followed in:

Empire Trust Co. v. *Panola Cotton Mills,* 149 S. Car. 8, 146 S. E. 612;

Albert Steinfeld & Co. v. *Southern Arizona Bank and Trust Co.,* 28 Ariz. 242, 236 Pac. 713;

Lizrodt v. *Miller,* 17 F. (2d) 533 (2nd Cir. Apps.);

21 R. C. L., Secs. 9 and 10, pages 15 and 16;

Wharton on Conflict of Laws, 3rd ed., Vol. 2, Sec. 453.

Illinois interest statutes.

In Illinois the right to interest is a creature of the statute or express agreement.

Thus in *Fowler* v. *Harts,* 149 Ill. 592, 36 N. E. 996, the court said:

> "At the common law the interest was recoverable in no case except where there was an express agreement to pay it, and in this state the rule seems to be well settled that it cannot be recovered except where the statute authorizes it, and interest may, therefore, be regarded as dependent upon and the creature of the statute."

In *City of Chicago* v. *Allcock,* 86 Ill. 385, the court said:

> "Interest cannot be recovered in this state, in any case, except where the statute authorizes it. At common law it could be recovered in no case except where there was an express agreement to pay. Interest may, then, be regarded as dependent upon and as the creature of, the statute."

See, also:

Madison Co. v. *Bartlett,* 1 Scam. 67 (Ill.);
City of Pekin v. *Reynolds,* 31 Ill. 529, 83 Am. Dec. 244;
I. C. R. R. Co. v. *Cobb, Blaisdell & Co.,* 72 Ill. 148;
South Park Commissioners v. *Francis Dunlevy,* 91 Ill. 54;
Coleman v. *Reamer's Exr.,* 237 Ky. 603, 36 S. W. (2d) 22;
Coombes v. *Knowlson,* 193 Mo. App. 554, 182 S. W. 1040.

The Act of the Illinois Legislature of May 24, 1879, as amended by the Act of 1891, is set forth in Chapter 74 of Cahill's Illinois Revised Statutes as follows:

> "*Sec. 1.* That the rate of interest upon the loan or

forbearance of any money, goods or thing in action, shall be five dollars ($5) upon one hundred dollars ($100) for one year, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.

"*Sec. 2.* Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due, on any bond, bill, promissory note or other instrument of writing; on money lent or *advanced for the use of another;* on money due on the settlement of account from the day of *liquidating* accounts between the parties and ascertaining the balance; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay of payment.

"*Sec. 3.* Judgments recovered before any court or magistrate shall draw interest at the rate of five (5) per centum per annum from the date of the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid, from the time when made or rendered, to the time of rendering judgment upon the same, and made a part of the judgment.

"*Sec. 4.* In all written contracts it shall be lawful for the parties to stipulate or agree that seven (7) per cent per annum, or any less sum of interest, shall be taken and paid upon every one hundred (100) dollars of money loaned or in any manner due and owing from any person or *corporation* to any other person or corporation in this state, and after that rate for a greater or less sum, or for a longer or shorter time, except as herein provided.

"*Sec. 5.* No person or *corporation* shall directly or indirectly, accept or receive, in money, goods, discounts, or thing in action, or in any other way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or thing in action, than as above prescribed.

"*Sec. 6.* If any person or corporation in this state shall contract to receive a greater rate of interest or discount than seven (7) per cent upon any contract, verbal or written, such person or corporation shall forfeit the *whole* of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation. And all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable.

"*Sec. 7.* The defense of usury shall not be allowed in any suit, unless the person relying upon such defense shall set up the same by plea, or file in the cause a notice in writing, stating that he intends to defend against the contract sued upon or set off, on the ground that the contract is usurious.

"*Sec. 8.* When any written contract, wherever payable, shall be made in this state, or between citizens or corporations of this state, or a citizen or corporation of this state and a citizen or corporation of any other state, territory or country (or shall be secured by mortgage or trust deed on lands in this state), such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons or corporations in this state, or which is or which may be allowed by law on any contract for money due or owing in this state: *Provided, however,* that such rate of interest shall not exceed *seven per cent* per annum. And if any such person or corporation shall contract to receive a greater rate of interest or discount than seven per cent upon any such contract, such person or corporation shall forfeit the whole of said interest so contracted to be received and shall be entitled only to recover the principal sum due to such person or corporation.

"*Sec. 9.* Whenever, in any statute, act, deed, written o. *verbal* contract, or in any public or private instrument whatever, any certain rate of interest is or

shall be mentioned, and no period of time is stated for which such rate is to be calculated, interest shall be calculated at the rate mentioned, by the year, in the same manner as if 'per annum' or 'by the year' had been added to the rate.

"*Sec. 10.* In all computations of time, and of interest and discounts, a month shall be considered to mean a calendar month, and a year shall consist of twelve calendar months; and in computations of interest or discount for any number of days less than a month, a day shall be considered a thirtieth part of a month, and interest or discount shall be computed for such fractional parts of a month upon the ratio which such number of days shall bear to thirty.

"*Sec. 11. No corporation shall hereafter interpose the defense of usury in any action.*

"*Sec. 12.* That an act entitled 'An Act to revise the law in relation to the rate of interest,' approved March 25, 1874, and an act entitled 'An Act to amend section eight (8) of an act entitled, "An Act to revise the law in relation to the rate of interest," approved March 25th, A. D. 1874,' approved March 3, 1875, be and the same are hereby repealed. But this section shall not be construed, so as to affect any rights that may have accrued or suits that may be pending when it shall take effect."

The Trustee is not pleading usury and is, therefore, contending for the forfeiture of all interest on the open ount. The alleged contract of the Deep Rock to pay ndard seven per cent calculated on the 24th of each nth on the preceding 30 days' average daily balance, ng in *parol* (Tr. 282-283; Knourek's answer to the 20th errogatory) is void and unenforceable. It does not con- tute usury although it exceeded the annual rate of seven cent because under the Illinois statute a corporation can interpose the defense of usury. Even a *parol* contract der the Illinois statute to pay seven per cent without

compound interest is not penalized by the loss of all interest. The Standard is entitled to recover interest at the rate of five per cent, and no more. Several states have this sort of statute.

In *Brockway* v. *Haller*, 57 Ia. 368, 10 N. W. 752, the court said that a parol contract "*is simply insufficient to enable the claimant to enforce a 10 per cent liability,*" although the parties had the power to contract in *writing* for 10 per cent interest. The court allowed the legal rate of 6 per cent because the contract was not usurious.

—*Staughton* v. *Simpson*, 72 Minn. 536, 75 N. W. 744;
Johnson v. *Hull*, 57 Ark. 550, 22 S. W. 176;
Long v. *Green Co. Abst. & Loan Co.*, 252 Mo. 158, 158 S. W. 305;
Coombes v. *Knowlson*, 193 Mo. App. 554, 182 S. W. 1040.

The Illinois courts have construed the Illinois interest statutes to mean what they say, that is, that parties may contract in *writing* for a rate of interest not in excess of 7 per cent per annum, and that a written contract for more than 7 per cent or a verbal contract for 7 per cent or more is void, leaving the legal rate of 5 per cent in force.

Thus in *Riggs* v. *Ladd*, 164 Ill. App. 464, the court said, "Parties are only allowed to bind themselves to pay 7 per cent by a written contract, and in the absence of a written contract, are limited to 5 per cent." That case was decided on August 10, 1911, involving a loan made in 1908. To the same effect, see:

Peoria Malting Co. v. *Davenport Malting Co.*, 68 Ill. App. 104;
Friend v. *Engel*, 43 Ill. App. 386;
Elder v. *Uchtmann*, 10 Ill. App. 488.

Compound interest.

A contract, oral or written, to pay in the future compound interest, is void to the extent of the compound interest.

In *Drury* v. *Wolfe,* 134 Ill. 294, 25 N. E. 636, the court said:

> "The general rule recognized by this court is, parties cannot be bound, by any contract made *before* interest is due, for the payment of compound interest (citing numerous Illinois cases), but, after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest." (Citing authorities.)

Referring to certain Illinois cases the court said:

> "There is therefore no authority in this (the rule in respect of interest bearing coupons) for holding that interest may be compounded indefinitely, or at all in cases where the payment of interest is not secured by some negotiable instrument, independent of the instrument whereby the original indebtedness is presumed to be paid."

In *Bowman* v. *Neeley,* 137 Ill. 443, 27 N. E. 758, the court held that a provision in a promissory note that if the interest is not paid annually it shall become principal and bear the same rate of interest, is against public policy and that interest on interest cannot be recovered. In that case it was not contended that the interest stipulated in the note was usurious.

The defense against compound interest *is not a plea of usury.* Compound interest is not recoverable in Illinois on a note or open account or any sort of contract to pay five or four per cent interest. That part of the contract, whether oral or written, stipulating for compound interest is unenforceable.

Thus in *Bowman* v. *Neeley*, 27 N. E. 758, the Illinois Supreme Court said:

> "It is *not contended that the note provides for the payment of usurious interest, or that a sum in excess of the legal rate was reserved therein.* The question presented is whether the interest on the note, if not paid when due according to the terms of the note—that is, annually—became principal, and drew interest, and whether such interest upon the interest is collectible; that is, *whether compound interest can be contracted to be paid.* It is conceded that the interest was not paid when due, or was not paid annually from the date of the note, and it is shown by the two judgments of the county and circuit courts that a difference of something in excess of $500 will be made, if interest upon overdue interest is allowed. It was said in *Leonard* v. *Villars*, 23 Ill. 377: 'To compute interest upon interest after its maturity, has, by all courts, whether exercising equity or common law jurisdiction, been held to be compound interest, and in violation of law.' It is clear that the contract is here for compound interest. This question has been considered by this court, and we have uniformly held that compound interest is not recoverable in this state. In a late case—*Drury* v. *Wolfe*, (Ill.) 25 N. E. Rep. 626 (not officially reported), it was said: 'The general rule recognized by this court is, parties cannot be bound by any contract made before interest is due for the payment of compound interest.' Citing *Leonard* v. *Villars, supra; Harris* v. *Bressler*, 119 Ill. 467, 10 N. E. 188; *Bank* v. *Davis*, 109 Ill. 633, and other cases. It may therefore be regarded as the *settled law of this state*, whatever may be the rule elsewhere, that parties to a contract *cannot stipulate in advance for the payment of interest upon interest.*"

The Illinois courts follow the rule announced in *Quackenbush* v. *Leonard*, 9 Paige 334 (N. Y.), in which the Chancellor said:

> "The principle of not giving effect to a stipulation

for the compounding of future interest upon a debt does not arise from the usury laws. It is merely adopted as a rule of public policy to prevent an accumulation of compound interest in favor of negligent creditors who do not collect their interest when it becomes due, which negligence is found in the end to be an injury rather than a benefit to the debtor."

Burden on Standard to prove Exact amount of interest.

If the court disallows the compound interest at the rate of 7 per cent, then it behooves Standard to make an accurate calculation of compound interest charged and deduct it from the interest charge of $4,819,222.07. Likewise, if the court disallows 7 per cent interest and allows 5 per cent, it behooves Standard to make a calculation showing the exact amount of interest due it at the rate of 5 per cent. If the Standard does not make these calculations on whichever basis the court allows, then its entire interest claims must be disallowed because it would be contaminated with *(a)* compound interest, and *(b)* if 5 per cent is the fixed rate, it would be contaminated with the excess 2 per cent and compound interest.

In *Graves* v. *Ranger,* 52 Vt. 424, the court had this matter under consideration in regard to determining the amount of plaintiff's claim in an accounting case. The court first stated plaintiff's contention as follows:

"The plaintiff contended before the auditor that the burden was on the defendant to prove that any and if any what parts of the account were for liquor; but the defendant contended that, under the findings stated, it was on the plaintiff to prove what part of the goods and medicine charged consisted of legitimate merchandise. The auditor found that, if the burden was on the defendant, the plaintiff should recover $286.91, but that if it was on the plaintiff, the defendant should recover

his costs; and referred the question of law as to the burden of proof to the court. The plaintiff excepted to the report, but the court, at the September term, 1879, DUNTON, J., presiding, overruled the exception, and rendered judgment on the report, *pro forma*, for the defendant, to which the plaintiff excepted."

In disallowing the plaintiff's claim, the court said:

> "The plaintiff willfully, for purposes of his own, misnamed his items and charged his liquors under the general head of 'goods' and 'medicine,' and thereby worked his account into such confusion that neither he nor the auditor can distinguish the legal from the illegal charges. The *burden* is upon him to establish the *validity of each item* of his account as a proper indebtedness against the defendant. Failing this, he can have no recovery. The misfortune of the plaintiff is like that of an owner who fraudulently *intermingles his goods* with those of another so that he cannot distinguish them. The law will not relieve him, and he must bear his loss as the price of his folly."

In an accounting case, *Worley* v. *Tennessee Centennial Exposition Company*, 62 S. W. 346, the Court of Chancery Appeals of Tennessee said:

> "Where, on account of the conduct and dealing between parties, matters are in such shape or condition that it is impossible for the court to satisfactorily ascertain the true condition and exact balance, and which one, if either, is indebted to the other, it is proper for the court to leave them where it finds them. *It is incumbent upon each one*, if there is a balance due from the other, to show and demonstrate with reasonable certainty and satisfaction."

Refinery, department and instrumentality of Deep Rock.

Standard, as the dominant, or to use the Standard's nomenclature, "proprietary company," so controlled, conduct-

ed and managed the corporate and financial affairs of the Deep Rock Oil Corporation and the Refining Company as to make the Refining Company a mere adjunct and department of, or an agency and instrumentality of, the Deep Rock with the attendant consequences that (a) *the Refining Company's separate entity will be ignored,* (b) *the two leases treated each as equivalent to a lease from the Deep Rock to itself,* (c) *all the Refining Company's assets treated in equity as assets of the Deep Rock for the benefit of the latter's creditors other than Standard,* (d) *the original and renewal lease adjudged fictitious, and* (e) *as such a mere fraudulent contrivance of Standard to divert Deep Rock's money into Standard's treasury.*

—*Commerce Tr. Co.* v. *Woodbury*, 77 F. (2d) 478;

Commodity Clause Cases, 213 U. S. 366, 53 L. ed. 836;

Dunnett v. *Arn*, 71 F. (2d) 918 (10th Cir. Apps.);

United States v. *Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. ed. 458-462;

United States v. *Reading Co.*, 253 U. S. 26, 64 L. ed. 760-781;

Chicago, M. & St. P. R. Co. v. *Minneapolis, C. & C. Association*, 247 U. S. 490-502, 62 L. ed. 1229-1237;

United States v. *Lehigh Valley R. Co.*, 254 U. S. 255-263, 65 L. ed. 253-262;

Trustees System Co. of Pennsylvania v. *Payne*, 65 F. (2d) 103 (3rd Cir. Apps.);

In re Watertown Paper Co., 169 Fed. 252 (2nd Cir. Apps.);

Central Republic Bank & Trust Co. v. *Caldwell*, 58 F. (2d) 721-735 (8th Cir. Apps.);

Palmolive Co. v. *Conway*, 43 F. (2d) 230 (affirmed 56 F. (2d) 83, 7th Cir. Apps.);

Westinghouse Electric & Mfg. Co. v. *Allis-Chalmers Co.*, 176 Fed. 362 (3rd Cir. Apps.);

Page v. *Arkansas Natural Gas Corporation,* (8th Cir. Apps.) 53 F. (2d) 27-38;

Barbour v. *Thomas,* 7 Fed. Supp. 277;

The Willem Van Driel, Sr., (4th Cir. Apps.) 252 Fed. 35;

The Santa Barbara, (4th Cir. Apps.) 299 Fed. 147;

Gulf, C. & S. Ry. Co. v. *Cities Service Co.,* 281 Fed. 214;

Portsmouth Cotton Oil Refining Corporation v. *Fourth National Bank of Montgomery,* (5th Cir. Apps.) 280 Fed. 879, affirmed 284 Fed. 718;

In re Muncie Pulp Co., 139 Fed. 546 (bankruptcy—2d Cir. Apps.);

Linn & Lane Timber Co. v. *United States,* (9th Cir. Apps.) 196 Fed. 593;

Searchlight Horn Co. v. *American Graphophone Co.,* 240 Fed. 745;

Baker Motor Vehicle Co. v. *Hunter,* 238 Fed. 894 (Bankruptcy—2d Cir. Apps.);

Gay v. *Hudson River Electric Power Co.,* (2d Cir. Apps.) 187 Fed. 13;

In re Rieger, Kapner & Altmark, 157 Fed. 609;

Leigh v. *Kewanee Mfg. Co.,* 127 Fed. 990;

Interstate Tel. Co. v. *Baltimore & O. Tel. Co.,* 51 Fed. 49 (affirmed 54 Fed. 50, 4th Cir. Apps.);

In re Eilers Music House, 270 Fed. 915 (bankruptcy—9th Cir. Apps.);

In re Kentucky Wagon Mfg. Co., 3 F. Supp. 958 (affirmed 71 F. (2d) 802);

Edward Finch Co. v. *Robie,* 12 F. (2d) 360 (bankruptcy—8th Cir. Apps.);

Wabash Ry. Co. v. *American Refrigerator Transit Co.,* (8th Cir. Apps.) 7 F. (2d) 335-343;

Costan v. *Manila Electric Co.,* (2d Cir. Apps.) 24 F. (2d) 383;

Clere Clothing Co. v. *Union Trust & Savings Bank*, (9th Cir. Apps.) 224 Fed. 363;

Luckenbach S. S. Co. v. *W. R. Grace & Co.*, (4th Cir. Apps.) 267 Fed. 676;

Wilkinson v. *Walker*, 294 Fed. 939;

Industrial Research Corporation v. *General Motors Corporation*, 29 F. (2d) 623;

State v. *General Stevedoring Company*, 213 Fed. 51-74;

Joseph R. Foard Co. v. *State of Maryland*, (4th Cir. Apps.) 219 Fed. 827;

Dillard & Coffin Co. v. *Richmond Cotton Oil Co.*, 140 Tenn. 290, 204 S. W. 758;

Platt v. *Bradner Co.*, 131 Wash. 573, 230 Pac. 633;

Erkenbrecher v. *Grant*, 187 Cal. 7, 200 Pac. 641;

14 C. J. 61, 62, 63;

Bethlehem Steel Co. v. *Raymond Concrete Pile Co.*, 141 Md. 67, 118 Atl. 279;

Day v. *Postal Tel. Co.*, 66 Md. 354, 7 Atl. 608;

Powell on Parent and Subsidiary Corporations, pages 7, 8, 17, 37, and 68.

Refining Company organized as fraudulent instrumentality.

As pointed out on page 96 herein, the Refining Company was organized for the fraudulent purpose of evading the lien of the holders of the Deep Rock's first mortgage bonds. The Standard and Deep Rock contemplated the investment of several million dollars in additional leases and the cracking plant, which, if invested in the name of the Deep Rock, would fall under the lien of the first mortgage. The Refining Company was a fraud to begin with.

Not only was the Refining Company organized as an instrumentality by which the Deep Rock and Standard could evade the lien of Deep Rock's first mortgage bonds, but it

was used continuously as a fraudulent device. *This is deve*
oped under the title "Prospectus" beginning herein on pa
120. The prospectus did not disclose *(a)* the existence
the Refining Company, or *(b)* the spurious and fraudule
lease from the Refining Company to the Deep Rock, or th
the cracking plant and stills were no part of the Deep Rock
refinery, but on the other hand, expressly recited that t
Deep Rock "is a balanced, self-contained unit of the petr
leum industry, embracing fully within its own organiz
tion *complete properties* and facilities for the productio
refining, transportation and m a r k e t i n g of its products
which are distributed under its "widely-known Deep Ro
trade-mark." It recited that the refinery had a capaci
of 10,000 barrels per day, is in the heart of the Mid-Cont
nent field, and "is a completely equipped plant, coveri
391 acres, and *includes a modern cracking plant,* parafi
wax and lubricating oil equipment, and tank storage cap
city of 2,315,000 barrels." The Refining Company was us
to defraud Deep Rock's subsequent creditors, as well
creditors having claims at the date of the Refining Co
pany's organization. This all appears more fully in our di
cussion under the title "Prospectus," beginning on page 1
herein.

Anderson, on Limitations of Corporate Entity, sectio
496, says:

> "It is the general rule, well established and abu
> dantly sustained by the almost unanimous modern a
> thority, that a corporation cannot be organized for t
> purpose of perpetating fraud. Neither can corpora
> entity be used for shielding or covering up fraudule
> transactions. So, where a corporation has been org
> nized as an instrumentality for the effectual perpetr
> tion of fraudulent designs, as where an individual h
> incorporated himself in order to hinder and if possib
> defraud his ceditors, courts will go as far as necessar
> in disregarding the corporate fiction, in order to rea

the proper ends and accomplish justice. Such a corporation is a mere parasitic growth, a mass of fungus, which will be lopped off clean whenever necessary to attain proper results."

In *Matchan* v. *Phoenix Land Inv. Co.*, 159 Minn. 132, 198 N. W. 417, the court said:

"Where a corporation has been organized and used as an instrument of fraud; where, as here, an individual has incorporated himself in order to hinder and, if possible, defraud creditors, courts will go as far as necessary in disregarding the corporation and its doings in order to accomplish justice. Such a corporation is a mere parasitic growth, a mass of fungus, which will be lopped off clean whenever necessary to sound results. *Linn & Lane Timber Co.* v. *U. S.*, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. ed. 725. * * *

"Where such a thing is attempted, 'courts of law, equity or bankruptcy do not hestitate to tear aside the veil of corporate entity' and ascertain 'the actual and substantial beneficiaries.' Fletcher on Corporations, Sec. 44. See, also, 14 C. J. 61; *McFadden* v. *Jenkins,* 40 N. D. 422, 169 N. W. 151.

"The fraudulent organizer of a corporation, intending to conceal his property from his creditors, cannot disinfect and immunize his work by admitting to its expected benefits one or more favored ones among his creditors. The corporation does not rid itself of guilt and its results simply by admitting one or more innocent stockholders. That would indeed be an easy and convenient method of perpetrating fraud. It is not permissible on any ground. Wrongdoers cannot escape justice simply because their associates are not all bad."

In *Macfadden* v. *Jenkins,* 40 N. D. 422, 169 N. W. 151, the court, in saying that "A corporation cannot be greater than law and equity," also said:

"In such case the protecting hands of equity will *brush aside* the outward forms of the corporate entity,

> and analyze the foundation purpose and intent of the corporation, and if the purpose and intent of the corporation are not imbedded in good faith, and are but a cover for wrong and fraud against the innocent, the corporate entity will afford no protection for such wrong and fraud in a court of equity. * * * but neither law nor equity will ever recognize the right of a corporate entity to become the *receptacle or cover for* fraud or wrong based upon deception for the purpose of defeating the right of innocent parties."

In a case where the very organization or formation of a corporation was held to be a fraud on subsequent creditors, *Rice* v. *Sanger Bros.*, 27 Ariz. 15, 229 Pac. 397, the court said:

> "* * * that a corporation may not be formed for the purpose of perpetrating a fraud or other illegal act, under the guise of the fiction that a corporation is a legal entity, separate and distinct from its members. When this is attempted, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no corporation had been formed."

It is little wonder in this age of top holding companies, with the oldest son also a holding company and the oldest daughter also a holding company, each with numerous children, the United States Supreme Court, in *McCaskill Co.* v. *United States,* 216 U. S. 515, 54 L. ed. 596, said:

> *"A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose."*

Nor is there any wonder that President Roosevelt recommends to Congress that the evils of holding company operations be curbed.

Graf and Kennedy were naked trustees for the Deep Rock. Their trusteeship was naked and devoid of any pow-

er. *An examination of the plat or map of the Deep Rock's refinery grounds shows that the deed to Graf conveyed small parcels scattered in and around the refinery plant and disconnected from each other. The Graf deed made a sort of checker board out of the Deep Rock's property. Two Refining Company or Graf stills were constructed along side of Deep Rock's stills.* (See Moody, Tr. 678.)

The Refining Company was an evasion and (with the exception of the *original* Bradstreet properties, $649,999.00, in exchange for which it issued 9,000 shares of its stock to Kennedy as Trustee or nominee of Deep Rock) did not have or claim to have any money or property of any kind or character prior to the book entries made in December, 1925, on direction of Braheney, the Standard's general auditor, vice-president and director. *The Refining Company never in actual fact functioned as a corporation.* As a corporation it was not only a fiction of law, but its whole career has been fictitious. The separate corporate entity theory will not be permitted by courts of justice to protect knavery, circumvent a statute, defraud creditors or evade an existing obligation.

Pertinent here are the remarks of I. Maurice Wormser, LL. D., Professor of Law, Fordham University, and Editor of the New York Law Journal, in his little book entitled, "The Disregard of the Corporate Fiction and Allied Corporate Problems," published by Baker, Voorhis and Company. On page 40, he said:

> "Our Lady of the Common Law is garbed beautifully. I see her before me, clad in radiant robes of purest white. I see her gown besprinkled with pearls and diamonds. I see a starry halo above her head. She walks majestically and with a stately mien. Her task is to furnish us a code of justice as beautiful and sublime as the vision of herself. But now, as I gaze, the picture alters. I see our Lady wielding in her hand a

bright sword. I see the sword flash. It has the thunders and the power of the Almighty behind it. It cuts down wrong. It stamps on fraud. It blots out vice and crime.

"No cunning use of fiction can stand before that sword. It strikes down the subtle chicanery of the sharpest lawyer. It sees through every device of the most cleverly wrought evasion. It is not helpless against the mail of corporate cloaks, though moulded from the stoutest steel. The sword of justice can cut through to the heart and kernel. The time shall never arrive in the development of Our Lady's long and successful career when a fiction can be perverted in such manner that her sword shall be helpless to strike it down, nor will she ever permit sophism to be enthroned above law or trickery above justice."

Or, as said by Judge PHILLIPS in *Dunnett* v. *Arn*, 71 F. (2d) 912, 918, speaking for the Tenth Circuit Court of Appeals:

"*Corporate entity may be disregarded where not to do so will defeat public convenience, justify wrong, protect fraud, or defend crime. Pierce* v. *National Bank of Commerce*, (C. C. A. 8) 13 F. (2d) 40, 47; *Boatright* v. *Steinite Radio Corp.*, (C. C. A. 10) 46 F. (2d) 385, 388; *Hamilton Ridge Lumber S. Corp.* v. *Wilson*, (C. C. A. 4) 25 F. (2d) 592; *Maloney Tank Mfg. Co.* v. *Mid-Continent Petroleum Corp.*, (C. C. A. 10) 49 F. (2d) 146, 147."

That the Refining Company, although a *legal fiction*, never existed in contemplation of *facts* otherwise than as a department of Deep Rock, and its corporate entity will be ignored, is clearly proven by the following undisputed facts:

(a) The Refining Company never received any money for its capital stock.

(b) It appears 8990 shares of Refining Company stock were (a) first issued to J. C. Kennedy, Trustee, on March 22, 1923, and then on that same day (b) surrendered and re-

sued to M. A. Morrison, then and continuously to now a *Deep Rock and Standard* common director in whose name the stock still stands of record. There is no doubt Standard considered Kennedy originally and Morrison from March 22, 1923, Deep Rock's nominee holding the stock in trust for Deep Rock. The 7th and 8th items from the bottom of the second page of Exhibit "A" to Standard's claim prove this as by these items representing book entries made in March, 1926, as of October 1, 1925, Standard admitted the stock belonged to Deep Rock *and as of October 1, 1925,* undertook to buy the same from Deep Rock by first charging Deep Rock with $649,999.00 and simultaneously crediting Deep Rock's account with that sum. (See Francisco's testimony, Tr. 201 to 209, inclusive.)

(c) It never paid or furnished any money for the Bradstreet properties, additions thereto, or the cracking plant, and there is no claim that it did.

(d) It never borrowed any money, never paid out any money, and *never in fact had any money.*

(e) All the property alleged to belong to the Refining Company has been in the possession of the Deep Rock at all times and never in the possession of the Refining Company.

(f) The Refining Company never paid its officers any salaries and never had any employees of its own. (Tr. 488) Its officers were Deep Rock's officers and Deep Rock paid their salaries, which means that a corporation, the Deep Rock, whose stock was partly owned by the public, paid the salaries of the officers of the Refining Company whose stock *in toto* Standard now *claims* to own.

(g) It never had a bank account. (Tr. 488)

(h) It "was not an operating company" and never paid any office rent before or after the October 1, 1925 lease but used the Deep Rock's offices; nor did it pay for any tele-

phone or telegraph service. Deep Rock paid it all. (Kerr's answer to the 10th, 11th, 12th and 13th interrogatories.)

(i) It never paid any taxes. (Tr. 558) And all state and federal income taxes assessed against it were paid by Deep Rock or filed as a claim against Deep Rock's receivers. (Kerr's answer to the 7th, 8th and 9th interrogatories.) As conclusive evidence that the Standard treated the Deep Rock as the equitable owner of all the properties standing in the name of the Refining Company, the *Standard,* in December, 1926, charged the Deep Rock with the sum of $29,565.91 federal income tax allocated by the Standard to the Refining Company on the Standard's consolidated Federal income tax return. (See Knourek's answer to the 64th interrogatory.) That amount was what Standard considered was the Refining Company's proportion of the consolidated federal income tax for the year 1925, but paid in the year 1926. *Even after the October 1, 1925 lease, Standard treated and dealt with the Refining Company as a mere agency and department of Deep Rock.* Thus in 1927 and 1928 Standard charged Deep Rock with Refining Company's 1926 and 1927 Federal income taxes, totaling $162,000.00, along with other items specified herein. (Knourek's answer to the 21st interrogatory, and Tr. 537.)

The Refining Company's Federal income taxes for the year 1926, $81,000.00, and for the year 1927, $81,000.00, were charged to Deep Rock during 1927 and 1928, two and three years after the lease was made. These last two items were charged against the Deep Rock under item entitled "Sundry Expenditures," but in fact were the Federal income taxes on the Refining Company's income from rents. (Tr. 356-360 also Knourek's answer to the 21st interrogatory, pages 15 to 17, inclusive.) These charges against Deep Rock for the Refining Company's Federal income taxes are consistent only with Deep Rock's ownership of the Refining Company, o

all its stock. These charges are an express admission by Standard that it is not the owner.

(j) It never transacted any business except as its President and Secretary went through the form of executing the original lease in March, 1926, as of October 1, 1925, and the renewal lease in December, 1930, as of date of October 1, 1930, and the declaration of imaginary dividends after the leases were made. (Tr. 434) *It did not even collect or attempt to collect the rentals accruing under the leases.*

(k) A majority of the Refining Company's directors have been at all times Deep Rock directors and most of the time all five of the Refining Company's directors were Deep Rock directors, and at all times two of the Refining Company's directors were Standard and Deep Rock directors. (See Exhibit No. 20 to "Stipulation.")

(l) Although the Refining Company had a Board of Directors they were mere dummies of the Deep Rock and Standard and dared not exercise any independent judgment because the Standard had the power and would no doubt have removed them. *There were no meetings of stockholders or directors between February 27, 1923, and March 25, 1925.* (Kerr's answer to the 21st interrogatory.)

(m) The practice of issuing the Refining Company stock to individuals who did not claim to own it left the ownership open to parol proof that it belonged either to the Deep Rock or the Standard. There was no record evidence and is not now of the actual owners of the Refining Company stock, it being admitted that the individuals to whom the stock certificates were issued did not own the stock. (Tr. 390)

(n) The Deep Rock developed and operated the Bradstreet properties, made additions thereto at its own expense, paid for the cracking plant. total $1,894,592.11 (Tr. 441)

and operated them for two years and seven months without accounting to either the Standard or Refining Company for the proceeds of the operations, which, after retirements totaled $1,489,628.79. (Tr. 224 and 473) No claim has ever been made by either the Refining Company or the Standard that the Deep Rock should account to either for its operations during the first two years and seven months. (Tr. 316)

(o) After the execution of the October 1, 1925 lease Deep Rock expended on the cracking plant, replacements and new stills, etc., $732,810.43, up to date of receivership. (See Francisco's answer to the 4th and 47th interrogatories, and Kerr's answer to the 14th interrogatory.) Deep Rock never sought to recover the cost of said replacements from either the Refining Company or the Standard.

(p) The Refining Company never in fact received or collected any of the lease rentals. The Deep Rock each month would credit the Refining Company with the rentals called for by the lease, whereupon the Refining Company would go through the form of declaring imaginary dividends payable to the Standard out of the rentals. (See Kerr, Tr. 525-526, and Knourek, Tr. 330 and 430 to 434, inc.) As said by Knourek, Standard's accountant and witness, "It was just a bookkeeping transaction." (Tr. 434; Knourek's answer to the 33rd interrogatory.)

(q) Standard paid Corporation Trust Company of Delaware its fees as statutory agent for the Refining Company for the years 1927 to 1932, inclusive, and charged them to Deep Rock. (See Knourek's answer to the 21st interrogatory, pages 15 to 21, inclusive.) These charges can be justified on no other theory than *(a)* Deep Rock's ownership of the Refining Company's assets or stock, or *(b)* that Deep Rock was a mere agency or department of the Standard. The leases did not obligate Deep Rock to pay them.

(r) Not least but highly important is the fact that the

cracking plant was a necessary as well as actual adjunct to Deep Rock's refinery, as shown by the evidence pointed out beginning on page 114 herein. Operated as a unit. (Tr. 681, 682)

The Federal Income Tax Acts authorized corporation consolidated income tax returns where two or more corporations are affiliated *(1)* "if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or *(2)* if substantially all the stock of two or more corporations is owned or controlled by the same interests." (40 Stat. L. 1082, Chap. 18.) Ownership by one corporation of a majority or substantially all the stock of another corporation is not alone sufficient under the revenue act to justify a consolidated return. This construction of the statute is well established. *Control* of stock of one corporation by another as a condition of right to make a consolidated return as affiliated corporations is not satisfied by control through acquiescence or business consideration and without binding force. There must be two things: *(a)* Control legally enforceable, and *(b)* invested capital of both corporations employed in a single business enterprise.

—*Great Lakes Hotel Company* v. *Commissioner,* (7th Cir. Apps.) 30 F. (2d) 1;
Atlantic City Electric Co. v. *Commissioner,* 288 U. S. 152, 77 L. ed. 667;
Commissioner v. *Shillito R. Co.,* (6th Cir. Apps.) 39 F. (2d) 830, 69 A. L. R. 1266, and annotations.

In *sustaining the right to make a consolidated return* the Sixth Circuit Court of Appeals in the *Shillito* case (69 A. L. R. 1266, *supra)* stated facts so similar to the ones in this case we are justified in quoting that case at length. The court said:

"The John Shillito Company, referred to hereinafter as the store company, was organized under the

laws of Ohio on June 22, 1882, with an authorized capital stock of $2,000,000, consisting of 20,000 shares of common stock of $100 par value per share, which was issued to acquire the business of its predecessor partnership established in 1830. It conducts a retail department store. In 1914 it caused to be incorporated the Shillito Realty Company, hereinafter referred to as the realty company, for the purpose of converting a portion of its fixed assets into liquid working capital. The authorized capital of the new corporation was $1,200,000, divided equally into preferred and common stock, *both with full voting power.* To this company the store company deeded its land and buildings used for store purposes, receiving in payment therefor $600,000 in cash and all of the common stock of the realty company of the par value of $600,000. The cash payment was from money secured from the sale of the preferred stock of the realty company to *stockholders of the store company* and to others. Thereafter the realty company made a perpetual lease of the property to the store company at an annual rental of $72,000 and the payment by the lessee of all taxes, insurance, assessments against the property, and all other operating expenses of the lessor. An option to repurchase the property after ten years, for $1,200,000 was provided in the lease. Upon formal request of the store company, the realty company reduced the annual rental to $36,000 on June 25, 1918. *The only business of the realty company was the ownership of the property used by the store company, the collection of the rental therefor, and the declaration and payment of dividends solely out of the money received as rent under the lease. Its office was in the office of the store company.* Its officers and directors were at all times the nominees of Stewart Shillito, president of both companies. At each stockholders' meeting, the stock of the minority interests was voted by proxies given to a committee of which John Shillito was chairman. During the time in question, the store company directly owned all of the 6,000 shares of common stock of the realty company, and of the 6,000 shares of preferred stock outstanding 1,862 shares were owned by

stockholders and officers of the store company. Thus the store company and its stockholders and officers owned approximately 66 per cent of all of the outstanding stock of the realty company, common and preferred. The remaining 34 per cent of the total amount of stock was all preferred stock. Of this 34 per cent approximately 15 per cent was owned or held by employees of the store company and approximately 11 per cent was owned by business associates of Stewart Shillito, president of both companies, and who owned 55 per cent of the stock of the store company.

"Section 240(b) of the Revenue Act of 1918 (40 Stat. 1082) provides as follows: 'For the purpose of this section two or more domestic corporations shall be deemed to be affiliated *(1)* if one corporation owns directly or controls through closely affiliated interests or by a nominee or nominees substantially all the stock of the other or others, or *(2)* if substantially all the stock of two or more corporations is owned or controlled by the same interests.'

"The Commissioner contends that the relationship of these two corporations cannot satisfy the test of either statutory definition of affiliated corporations authorized to file a consolidated return, and that 'stock control' means something more than is presented by the ownership and control shown here. But we think the question largely turns on the character of the preferred stock of the realty company and also the status of the 34 per cent of such stock which may be said to be outside owned.

"That ownership or control of substantially all of the stock contemplates domination by virtue of stock rather than by management or majority is not to be disputed in the face of the plain words of the statute. *But the stock that controls is the stock that has the power to dominate the business and the voting strength to make that domination effective.* If such a situation exists, you may have a *business unit* and affiliated corporations within the meaning of the statute. In addition to the

ownership and control of the stock as disclosed by the facts in this case, the realty company was a *creature* of the store company, and was dominated by the latter in such manner that *no diversity of interest* could materially affect its control or management. *The only purpose of its existence was to promote the interests of the store company, no more.* No considerable amount of stock was in the hands of what might be called outside interests, or in the hands of those who, if hostile or adverse, could materially affect its control, operation, or management. No possible adverse interest may be perceived in the ownership of outside preferred stock. The relationship and mutual dependency of the two companies was such as to *effect a complete unity of interest and enterprise.* The corporate activity of the realty company *was non-existent save for purposes of the store company. It was a single business enterprise.* It is true that the preferred stock had voting rights, but to what purpose? It could neither increase its dividends nor redeem itself, nor influence the policy or purpose of its management. At the request of the store company, the annual rental provided by the lease was reduced one-half by the realty company.

"We think the term 'stock,' as used in the statute, is clearly intended to mean stock with a potential voting power which, *if asserted,* will be effective in the management or control of the corporation. *This preferred stock was so hedged with limitations that it was ineffective in respect to any control or domination.* Its annual dividend of 6 per cent was fixed. It was to be paid in full on liquidation, and was redeemable at the option of the store company, after 1924, for $105 per share. The *preferred stock* bore no burden of taxation and *exercised no voice* in the management or policy of the company, nor did it have any hazards or benefits to be reckoned with in the return of income for taxation. Its redeemability gave it the color of indebtedness.

"We think this case stronger on the facts than *Great Lakes Hotel Company* v. *Commissioner,* (C. C. A.) 30 F. (2d) 1.

"The ownership of stock which may vote, *but not be effective in control*, can have but little influence in the domination of the corporation. Substantially all of the stock which was *effective* in control was owned or controlled by the same interests. For practical purposes, the ownership or control of the 34 per cent of preferred stock of the realty company was so ineffective in control as to be disregarded."

As it appears the Standard not only made a consolidated income tax return for Deep Rock and the Refining Company but included itself therein (see Kerr's answer to the 51st interrogatory) we invite consideration of this very FACT when you come to consider our contention that the Deep Rock was and is a mere adjunct and department of the Standard. Our "Point Five" discusses that phase of the case. (See page 357 herein.)

These facts, coupled with the additional fact that the Standard, since 1921, has controlled the Deep Rock through ownership of its common stock *and has actually exercised its control* in such a way as to make it appear that the Bradstreet properties and additions thereto and the cracking plant belong to the Deep Rock, show that the refinery and the cracking plant, the Bradstreet properties and additions thereto, along with the other business of the Deep Rock, constituted a *single system*, which is further emphasized by the prospectus upon which the $10,000,000.00 in notes were sold and the prospectus upon which the $7,500,000.00 April 15, 1926 notes were sold. (See Exhibits Nos. 1 and 6 to "Stipulation"; R. Vol. 2, pp. 254 and 297.)

We concede that the ownership of all the stock or the controlling interest in the stock by one corporation of another does not, within itself and independent of other facts, obliterate the separate corporate entity of the two corporations or necessarily make one the agent of or department of

the other. But where the dominant corporation *exercises its control* in such a manner as to make the subsidiary a mere department or adjunct of the parent corporation or of an allied corporation, then the corporate entity will be ignored.

As said in *In re Watertown Paper Co.*, 169 Fed. 252 (a case often cited), decided by the United States Circuit Court of Appeals for the Second Circuit:

> "Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The only exceptions to that rule possibly applicable here are *(1)* The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. *(2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation.*"

In that case, however, the court held that the evidence did not prove any fraud or that the Paper Company was a mere department of the Pulp Company.

On May 3, 1909, the United States Supreme Court decided the *Commodity Clause Cases*, 213 U. S. 366, 53 L. ed. 836, in which the court held that the Hepburn Act did not forbid a railroad carrier from transporting articles or commodities in interstate commerce when such articles or commodities had been manufactured, mined or produced by a corporation in which the railroad owned the stock, although the Hepburn Act prohibited the railroad carrier from transporting such commodities in which the railroad had any "interest, direct or indirect." The case was remanded to the court below for further proceedings, whereupon the government filed an amended bill charging that the railroad company was violating the Hepburn Act in that it was trans-

porting in interstate commerce commodities mined by a corporation in which the railroad not only owned the stock *but managed and controlled the coal company in such a way as to make it a mere department of the railroad.* This amendment was sustained by the Supreme Court.

In *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. ed. 458-462, Mr. Chief Justice WHITE, in speaking for a unanimous court, summed up the government's amendment as follows:

> "In substance it was averred that as to this particular coal company, the railroad company was not only the owner of all the stock issued by the coal company, *but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence, and to make it virtually but an agency or dependency or department of the railroad company.* In other words, in great detail facts were averred which tended to establish that there was no distinction in *practice* between the coal company and the railroad company, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause."
>
> (NOTE: Standard used its power of control of Deep Rock and the Refining Company so as to "deprive" the Refining Company of any existence "independent" of the Deep Rock. In fact the evidence shows that neither could profitably exist without the other.)

In sustaining this amendment and holding that it alleged facts sufficient to show that the coal company was a mere instrumentality of the railroad and that its separate corporate entity should be ignored under the Hepburn Act, Mr. Chief Justice WHITE further said:

> "And we think it is equally clear that the grounds of the amendment were not foreclosed by our former

decision. While that decision expressly held that stock ownership by a railroad company in a bona fide corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced, or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned, or produced by a corporation in which the railroad held stock, *and where the power of the railroad company* as a stockholder was USED to obliterate all distinctions between the two corporations. That is to say, where the *power was exerted* in such a manner as to so *commingle* the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes. * * *

"The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concened, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so expected, because any control which is exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a bona fide exercise of such ownership, and which could only have arisen through the *use* by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation, for its own corporate purposes, *complete power* over the affairs of the coal company, just as if the coal company were a mere *department of the railroad*. Indeed, such

a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged as the railroad company held all the stock in its coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulting from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered, they were but one and the same. This however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership—particularly to a case where the ownership embraced all the stock of a producing company—and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a bona fide separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the *use* of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation, and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause."

other words, the government's amended bill alleged facts owing that the railroad company *used* its stock ownership such a way as to exercise "complete power over the af-

fairs of the coal company, just as if the coal company were a mere department of the railroad."

There can be no doubt from the evidence that the Standard used its stock ownership in the Deep Rock in such a way as to make the Refining Company a department of the Deep Rock.

In other words, as said by Mr. Chief Justice WHITE in the *Lehigh Valley R. Co.* case, 220 U. S. 257, *supra*, "* * * and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable, and therefore to cause both corporations to be one for all purposes."

In a later case, *United States* v. *Reading Co.*, 253 U. S. 26, 64 L. ed. 760-781, the court announced another and additional exception to the rule of separate corporate entity. In that case a holding company was involved and the suit was to dissolve corporate relations as a violation of the Anti-Trust Laws. Mr. Justice CLARKE, speaking for the court, said:

> "The relation between the Central Railroad Company and the Wilkes-Barre Coal Company presents a different question, for here the Railroad Company owns *over eleven-twelfths* of the stock of the Coal Company, and therefore the holding in 213 U. S. 366, *supra*, is especially pressed in argument—that the ownership of stock by a railroad company in a coal company does not cause the former to have such an interest in a legal or equitable sense in the product of the latter as to bring it within the prohibition of the act. But this holding was considered in *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 272, 55 L. ed. 463, 31 Sup. Ct. Rep. 387, and it was there held not applicable *where a rail-*

road company used its stock ownership for the purpose of securing a complete control over the affairs of a coal company, and of treating it as a mere agency or department of the owning company. This rule was repeated and applied in *United States* v. *Delaware, L. & W. R.* Co., 238 U. S. 516, 529 L. ed. 1438, 1443, 35 Sup. Ct. Rep. 783. It results that it may confidently be stated that the law upon this subject now is, that while the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two, such as to render it unlawful under the commodities clause for the railroad company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, *not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department* of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the *justice of the case may require. United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 272, 273, 55 L. ed. 458, 463, 464, 31 Sup. Ct. Rep. 387; *United States* v. *Delaware, L. & W. R. Co., supra; Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic & C. Asso.*, 247 U. S. 490, 501, 62 L. ed. 1229, 1237, 38 Sup. Ct. Rep. 553.

"Applying this rule of law to the relation between the Central Railroad Company and the Wilkes-Barre Coal Company, with the former owning *over eleven-twelfths* of the capital stock of the latter, and using it as the *coal mining department of its organization,* we cannot doubt that it falls within the condemnation of the commodities clause, and that this relation must also, for this reason, be dissolved."

The Refining Company falls within the exception to the rule of separate corporate entity in that its affairs were not

conducted "in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of" the Deep Rock.

Also in *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Association*, 247 U. S. 490-502, 62 L. ed. 1229-1237, Mr. Justice CLARKE, speaking for a unanimous court, said:

> "Much emphasis is laid upon statements made in various decisions of this court that ownership alone of capital stock in one corporation by another, does not create an identity of corporate interest between the two companies, or render the stockholding company the owner of the property of the other, or create the relation of principal and agent or representative between the two (*Pullman's Palace Car Co.* *Missouri P. R. Co.*, 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 391, 51 L. ed. 841, 852, 27 Sup. Ct. Rep. 513; *United States, ex rel. Atty. Gen.*, v. *Delaware & H. Co.*, 213 U. S. 366, 413, 53 L. ed. 836, 851, 29 Sup. Ct. Rep. 527; *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, 108, 54 L. ed. 112, 114, 30 Sup. Ct. Rep. 66; and *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 529, 530, 59 L. ed. 1438, 1443, 1444, 35 Sup. Ct. Rep. 873); and it is argued that since the order of the Commission requires that the tracks, the title to which is in the Eastern Company, be treated as the property of the stock-owning companies, the effect of it, if enforced, will be to deprive the Eastern Company of its property without compensation and to render valueless its capital stock owned by the Milwaukee and Omaha companies.
>
> "While the statements of the law thus relied upon are satisfactory in the connection in which they were used, they have been plainly and repeatedly held not applicable where stock ownership has been resorted to *not for the purpose of participating in the affairs of a corporation in the normal and usual manner, but for the purpose, as in this case, of controlling a subsidiary*

company so that it may be used as a mere agency or instrumentality of the owning company or COMPANIES. United States v. *Lehigh Valley R. Co.*, 220 U. S. 257, 273, 55 L. ed. 458, 463, 31 Sup. Ct. Rep. 387, and *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873. In such a case the *courts will not permit themselves to be blinded or deceived by mere forms of law*, but regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.

"Satisfied as we are by the evidence that the Eastern Company is a completely controlled agency of the two companies which own its capital stock, we agree with the Supreme Court of Minnesota that the fact that the legal title to what are obviously terminal or spur delivery tracks is in the Eastern Company should not be permitted to become the warrant for permitting a charge upon shippers greater than they would be required to pay if that title were in the owning companies."

In another action by the government against the *Lehigh Valley R. Co. (United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255-263, 65 L. ed. 253-262), the court said:

"The Railroad Company and the Coal Company had usually the same president, secretary, treasurer, and auditor, and the latter company admits, as it must, that the Railroad Company, 'as the owner of stock, controls and long since has been controlling, the election of its directors.' The Railroad Company *constantly advanced large sums of money to the Coal Company* for the purchase of property and for operating capital. The total of these advances to the year 1892 exceeded $15,500,000, which amount, however, was reduced by operations of the Coal Company to $11,500,00. The Coal Company never paid any dividends, its earnings being frankly treated as those of the Railroad Company, and the financial and other relations between the two companies

were so intimate and interlaced that in argument it is admitted that, 'in the last analysis, the assets of the Coal Company are the assets of the Railroad Company.'

"There is much more in the record to like effect, but sufficient has been stated to make it clear beyond controversy that the Coal Company was organized and conducted as a *mere agency or instrumentality of the Railroad Company, for* the purpose of avoiding the legal infirmity which it was thought might inhere in the owning of coal lands and in the conducting of coal mining, shipping, and selling operations by the Railroad Company, and that the policy of purchasing and leasing coal lands tributary to its lines for the purpose of controlling interstate trade and commerce in anthracite coal, and of preventing and suppressing competition therein, was deliberately entered upon by the Railroad Company, and, in combination with its agency, the Coal Company, was consistently pursued, with increasing energy and scope after the passage of the Anti-Trust Act, until the commencement of this suit, unless these purposes and results, in point of law, were modified and cured by the organization in 1912 of the Sales Company, and by the functions which it performed—which remain to be considered.

"On January 11, 1912, the board of directors of the Railroad Company requested the directors of the Coal Company 'to consider the propriety of organizing a Sales Company' and of entering into a contract with it when formed 'for a limited time' for the purchase and sale by it 'of the coal mined, purchased, and owned by the Coal Company.' The board also requested that the privilege of subscribing for the stock of the new company be extended, 'not to the Railroad Company, but, pro rata, to the common and preferred stockholders of the Railroad Company.' As if anticipating compliance with its request on the part of the Coal Company, of which it owned all of the stock, the officers of the Railroad Company were authorized at the same meeting of the board to take such action and make such conveyances as might be deemed necessary or advantageous

in perfecting the sales arrangement with the new company to be organized, and, in aid of the enterprise, a dividend of 10 per cent on the stock of the Railroad Company was declared, payable on February 26, which amounted in the aggregate to $6,060,800.

"On the same day the board of directors of the Coal Company resolved: that the new Sales Company should be organized, as requested by the Railroad Company, with a capital stock of $10,000,000, but that only $6,060,800 of it should be issued; that when the new company was formed the Coal Company should 'if possible,' contract with it for a 'limited time' for the sale to it 'of all coal which shall be mined, purchased, owned or acquired' by the Coal Company during the term of the proposed contract, so that the title to such coal should vest in the Sales Company 'before the transportation thereof shall be commenced.'

"The privilege of subscription to the capital stock of the new company was restricted to the stockholders of the Railroad Company.

"The Sales Company was promptly organized, and the minutes of the company show that slightly less than 97 per cent of the stock was subscribed for by stockholders of the Railroad Company.

"The Sales Company had seven directors. One of these, J. W. Skeele, who was also elected president, had been general sales agent of the Coal Company; another, W. R. Evans, had been assistant to the general sales agent of the Coal Company; another, L. D. Smith, was a director of the Railroad Company, and a fourth, Paul Moore, was a son of a large stockholder in the Railroad Company. The vice-president of the company, G. N. Wilson, had been general auditor of the Railroad Company, and the treasurer, W. J. Burton, had been employed as assistant secretary of the Coal Company.

"It is too plain for discussion that, with a company thus organized and officered, the making of a contract by the Coal Company for the sale of all of its coal to the Sales Company was, in substance and effect, making

a contract with itself, the terms of which it could *determine* in its discretion.

"Immediately after the organization of the Sales Company, the anticipated contract between that company and the Coal Company for the purchase of all the coal which the latter might mine or purchase was entered into and bears date March 1, 1912. This contract was to continue for ten years unless *terminated* in the manner which it provides for, and its terms are so nearly identical with the earlier *Lackawanna* contract, which is considered in *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. ed. 1438, 35 Sup. Ct. Rep. 873, that the judge who tried this case below, with entire propriety, says that the differences between the two are 'wholly unsubstantial' (225 Fed. 401). This court held that the contract in the *Lackawanna* case was void because violative of the provisions of the Anti-trust Act and the commodities clause of the Act to Regulate Commerce.

"The discussion of the *Lackawanna* contract is so full and satisfactory in 238 U. S. 516, that it would not serve any useful purpose to comment in detail upon the contract which we have here. It will suffice to say that the provisions of the *Lackawanna* contract, which were clearly determinative of the former decision by this court, are plainly the same in substance and almost exactly the same in form, as those in the contract we are considering, *viz.:* The agreement of the Coal Company *(1)* to sell and of the Sales Company to buy all of the coal mined by the Coal Company from lands owned or leased by it, together with all coal which it might purchase; *(2)* that the prices to be paid for the more important grades of coal shall be 65 per cent of the New York prices—the two contracts are in precisely the same words in this respect; *(3)* that, with negligible exceptions, the Sales Company is to sell no other coal, for itself or for any other, than that 'purchased' from the Coal Company; *(4)* that the Coal Company shall lease all of its facilities, structures, and trestles to the Sales Company; *(5) that either party shall have the right to*

abrogate and cancel the contract upon giving to the other six months' notice of its desire so to do; *(6)* that the Sales Company shall not buy coal except from the Coal Company—a provision which excludes the Sales Company, potentially a strong competitor, from the market. The Coal Company purchased 2,960,000 tons of coal in 1911, in addition to that which it mined.

"These are the contract provisions which led this court, in the former case, to hold that a corporation organized and circumstanced as is the Sales Company which we have here—subject to *be stripped at the will of another of all of its business and of all its facilities for carrying on the business for which it was incorporated* —was neither an 'independent buyer *nor a free agent*'."

Powell, in a recent book entitled "Parent and Subsidiary Corporations," page 7, says:

"The exercise of control by the parent corporation over the subsidiary appears in two phases. In the first, the subsidiary has become a mere instrumentality or puppet of the parent corporation, but nevertheless its properties and business have been kept sufficiently distinct on the face of things so that they may be identified and distinguished from those of the parent corporation. In the second phase, the properties or affairs of the two corporations have been so inextricably confused that it is impracticable to segregate them with respect to the particular transaction in suit.

"The Supreme Court of the United States in two prominent decisions has recognized these two phases in the following language:" (quoting *United States* v. *Reading Co.*, 253 U. S. 26, 64 L. ed. 760, and *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. ed. 458.)

"These two classes are both manifestations of the element of control, and differ only in degree. In one, the control is not exercised to the point of *completely confusing the separate identities and activities of the two corporations;* in the other, it is. *And in both the subsidiary is a mere 'instrumentality'.*"

Powell then says, on page 8:

> "The Instrumentality Rule, in its shortest for may now be stated:
>
> > 'So far as the question of control alone is co cerned, the parent corporation will be responsib for the obligations of its subsidiary when its co trol has been exercised to such a decree that t subsidiary has become its mere instrumentality.'
>
> "The Instrumentality Rule is recognized in all j risdictions in this country and our problem therefo is to determine the circumstances which render the su sidiary an 'instrumentality' within the meaning of t decisions. This is primarily a question of fact and degree."

We might pause here to call attention to the obvio fact that the existence of the Refining Company as a sep rate corporate entity was in no manner necessary to the su cessful operation of the Deep Rock's or Standard's bus ness and affairs.

Judge LINDLEY, in *Palmolive Co.* v. *Conway*, 43 F. (2 226, 230, in holding that courts "may freely go behind a parent distinct legal entities and ascertain whether the ci cumstances prove a device to evade taxation," further sai "The creation and use of three corporations could serve substantial beneficial purpose except to appear to remo income from the state though still creating it within t state." Judge LINDLEY's opinion was affirmed by the Se enth Circuit Court of Appeals (56 F. (2d) 83) in an opi ion fully concurring in Judge LINDLEY's reasoning.

The Bradstreet properties and additions thereto and t cracking plant were *absolutely essential to the successf operation of the Deep Rock, and this is clearly proven b the Standard's own witnesses.* Cummins testified, as her tofore pointed out, that the Deep Rock needed addition production in that its properties had been developed, a

"to go ahead," using Cummins' words, something had to be done to increase the Deep Rock's production. Majewski and other witnesses, Moody among the number, clearly proved that the cracking plant was absolutely essential to the successful operation of the Deep Rock's refinery.

(NOTE: See page 114 herein.)

In *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, 267 Fed. 676, the Fourth Circuit Court of Appeals said (page 681):

"From the statements and admissions in their respective answers these facts appear: The Luckenbach Steamship Company has a capital of only $10,000.00. The Luckenbach Company, also a Delaware corporation, is capitalized at $800,000. They have the same directors and the same officers, and Edgar F. Luckenbach, who was president of and personally managed both companies, owns 94 per cent of the stock of the Luckenbach Steamship Company, and almost 90 per cent of the stock of the Luckenbach Company. The latter company owns all or most of the steamers referred to in the record, some eight or nine in number. By contracts of May 1, July 1, and October 1, 1915, copies of which are annexed to the libel, these steamers were leased to the steamship company for terms running into the year 1926, and upon terms which, though something more than nominal, are obviously far below their rental value.

"Putting aside any inquiry into *the motive* for this arrangement, we think it too plain for serious question that the facts here considered show such identity of the two corporations, or at least give rise to such a strong presumption of their identity, as warrants the conclusion that the Luckenbach Company is equally responsible with the steamship company for the breach by the latter of its contract with the appellee. For all *practical purposes* the two concerns are one, and it would be unconscionable to allow the owner of this fleet of steamers, worth millions of dollars, to escape liability because it had turned them over a year before to a $10,000 corporation, which is simply itself in another form."

The court quoted and approved the following from its decision in *The Willem Van Driel, Sr.*, 252 Fed. 35, to-wit:

> "The elevators were constructed and operated merely as a *facility to* the business of the railroad company. Applying the language of Judge WALLACE in *Lehigh Valley Railroad Co.* v. *Du Pont*, 128 Fed. 840, 64 C. C. A. 478, the potential and ultimate control of all its property and business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. Such complete dominance and control by the railroad company made the elevator company its mere puppet. *United States* v. *Del. Lack. & Western R. R.*, 238 U. S. 516, 35 Sup. Ct. 873, 59 L. ed. 1438."

In *Wilkinson* v. *Walker*, 294 Fed. 939, the trustee of a corporation in bankruptcy brought suit to recover property transferred to the corporation's principal stockholder. The court sustained the trustee's right to maintain the action and held that the principal stockholder used the corporation as a mere instrumentality, and did not conduct its corporate affairs in the normal and usual manner. District Judge ARWELL said (page 947):

> "That portion of the suit which seeks a recovery on the theory that the defendant used the corporation as his agent to carry on his business, in order that he should have no personal liability, and yet reap the fruits of the same, and while so conducting the business received large sums of money, which he converted into real estate described in the petition, is difficult of solution. To support a recovery the plaintiff presents a multitude of authorities, among which are *Chicago, etc.*, v. *Minneapolis*, 247 U. S. 490, 38 Sup. Ct. 553, 62 L. ed. 1229; *In re Muncie Pulp Co.*, 139 Fed. 546, 71 C. C. A. 530; *In re Eiler's Music House*, (C. C. A.) 270 Fed. 915; *Ludvigh* v. *American Woolen Co.*, (D. C.) 159 Fed. 796; *Hunter* v. *Baker, etc.*, (D. C.) 225 Fed. 1006;

Watson v. *Bonfils,* 116 Fed. 157, 53 C. C. A. 535; *In re Kornit Mfg. Co.,* (D. C.) 192 Fed. 392; *In re Reiger, et al.,* (D. C.) 157 Fed. 609; *Wallerstein* v. *Ervin,* 112 Fed. 124, 50 C. C. A. 129; *In re Desnovers Shoe Co.,* 224 Fed. 372, 140 C. C. A. 58. These authorities, and they may be multiplied, support that very healthy commercial rule that no person or corporation *can carry on a business in the name of another entity,* and furnish capital therefor, and dominate the same, and receive the *profits thereof,* without subjecting both the property so accumulated and the capital so furnished to the debts and liabilities of the other concern."

In *Industrial Research Corporation* v. *General Motors Corporation,* 29 F. (2d) 623, Judge KILLITS held that in determining whether corporate entity should be disregarded because a corporation is in fact a mere instrumentality or adjunct of another corporation, each case should be regarded as *sui generis.* After admitting that the mere fact that stockholders of two corporations are the same, with one exercising control over the other through ownership of stock, does not make either the agent of the other or operate as a merger or destroy the separate corporate entity, he said, "But the fiction of corporate entity may be disregarded, where one corporation is so organized and controlled and its affairs are so conducted that it is, *in fact,* a mere instrumentality or adjunct of another corporation." (Citing authorities.)

Bearing in mind that the Refining Company never had any moneyed capital, that between the date of the Refining Company's organization in February, 1923, and the bookkeeping entries made on direction of the Standard's general auditor, Braheney, some time in December, 1925, that the Deep Rock was in possession of and operated all the property now claimed by the Refining Company without accounting for the profits therefrom, if any, that the Refin-

ing Company never had a bank account, never had any funds, never paid any of its officers or employees any compensation, that the salaries of the Deep Rock's officers were paid by the Deep Rock although they acted as officers of the Refining Company; that the Refining Company never paid any office rent or taxes, and in view of the other matters set forth on page 218 above, *we call attention to the decision of the District Court of Maryland in State* v. *General Stevedoring Company,* 213 Fed. 51-74, *in which the parent company was held jointly liable for damages for personal injury caused by an employee of the subsidiary company.* The District Court said:

> "It has never handled its own current funds. The expenses of doing its stevedoring business were paid by the Foard Company. The compensation for the stevedoring work it did was received by the Foard Company and deposited in the latter's bank account. The Stevedoring Company has never paid its officers any compensation. It has never paid anything for office rent, bookkeeping, or telephone service. All these were furnished by the Foard Company. The latter has always taken the greater part of the profits of the Stevedoring Company as compensation for its services in managing that company. The agreement under which this was done *has never been reduced to writing.* The witness who has been secretary and director of the Stevedoring Company since its organization, and for the last two years has been secretary of the Foard Company as well, frankly admits that he does not know what the agreement was. The gentleman who has been president of the Stevedoring Company since it was organized, and has for two years past been president of the Foard Company, says he made the agreement verbally with Mr. Foard, the then president of the Foard Company. He states that the Stevedoring Company was to pay the Foard Company for soliciting business or throwing any business it could to the Stevedoring

Company, or financing, to the extent that it deemed proper and prudent, a sum approximating the Stevedoring Company's net profits during the year. No figures were named. Precisely what was meant by a sum approximating the net profits is not defined.

"It is highly probable that Mr. Foard *never made his plans quite clear to any one else, if indeed they had been settled in his own mind.* During his lifetime the Foard Company kept in its books only such accounts as showed what sums it had received for the Stevedoring Company and what disbursements it had made on account of that company. It did not there enter the payments that were made by the Stevedoring Company out of the $2,000 which had been originally paid in for its capital stock. On December 31, 1910, the books of the Foard Company showed that the Stevedoring Company had made a net profit on operations of $6,517.40. This sum the Foard Company paid into the bank account of the Stevedoring Company and received from the latter a check for $5,000 *'for securing, financing and managing the business'* of the Stevedoring Company for six months. The difference between these checks, $1,517.40, represented what the Stevedoring Company took for itself after compensating the Foard Company. Before the 30th of the next June Mr. Foard was dead. Whatever plan he had for determining the relations of the two companies to each other died with him. Thereafter a new method of bookkeeping was adopted. In the bank account of the Stevedoring Company there never were but two deposits. The last of these was on the 4th day of January, 1911, and against it there never were drawn more than nine checks; the latest in date being October 31, 1911.

"After Mr. Foard's death the practice, or the form, of charging the Stevedoring Company a definite round sum for the Foard Company's services was abandoned, and at the end of every six months' period it was charged for *services in managing, soliciting, and securing business precisely the amount of the net prof-*

its of the Stevedoring Company for the period, neither more nor less."

The District Court's opinion in the above cited case was affirmed by the Fourth Circuit Court of Appeals in *Joseph R. Foard Co.* v. *State of Maryland,* 219 Fed. 827, wherein the court said:

> "Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a *department* of the business of the Foard Company as shipbrokers and agents. The two companies had the same officers; the Stevedoring Company handled no funds, except through the Foard Company; its losses were paid by the Foard Company and dealt with as if they were that company's own losses. All of the profits of the Stevedoring Company were kept by the Foard Company as a charge for *managing the business.* There are other like circumstances, but these are sufficient to show that the Stevedoring Company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded, as to the outside public, identical. *Interstate Telegraph Co.* v. *Baltimore, etc., Co.,* (C. C.) 51 Fed. 49; *Baltimore & O. Telegraph Co.* v. *Interstate Teleg. Co.,* 53 Fed. 50, 4 C. C. A. 184; *In re Watertown Co.,* 169 Fed. 252, 94 C. C. A. 528; *Chicago, etc., Co.* v. *Myers,* 168 Ill. 139, 48 N. E. 66."

In *Trustees System Co. of Pennsylvania* v. *Payne,* 65 F. (2d) 103, the Third Circuit Court of Appeals had under consideration the question of separate corporate entity of six corporations. The court stated the case as follows:

> "The Trustees System Service Corporation, organized under the laws of *Virginia* with its main offices

at Chicago, was the center of the system and in this litigation is referred to as the parent corporation. It owned all the capital stock (except qualifying shares) of the Trustees System Company of Pennsylvania which for convenience we shall call Trustees of Pennsylvania. This corporation owned in turn all the stock of the Trustees System Company of Reading and the Trustees System Company of Philadelphia, called, respectively, Trustees of Reading and Trustees of Philadelphia. Trustees of Reading owned all the stock of Trusco Company of Reading, and Trustees of Philadelphia owned all the stock of Trusco Company of Philadelphia, herein referred to, respectively, as Trusco of Reading and Trusco of Philadelphia. The five subsidiaries are, it is averred, corporations of Pennsylvania. Their capital, paid in or earned, is not stated.

"The corporate structure of the system however did not end here. Two more corporations were tied up with those we have named. These were the Industrial Loan and Guaranty Company and the Trustees System Extension Corporation, regarded and referred to as affiliates. Their capital structure is not given nor is it important. Enough is stated to show that the Industrial owned in some instances practically all and *in others a majority* of the several classes of common stock of the parent corporation, and *Extension* owned certain of its preferred stock. *Of the balance* much was owned by the public. There is nothing to show who owned the stock of Industrial and Extension.

"The six system corporations were organized and they function in this fashion: F. J. Gibbons, the president, and J. G. Born, the secretary-treasurer of the parent corporation, were the president and secretary-treasurer of each of the subsidiary corporations. They also constituted a *majority of the board of directors* of the parent corporation, and, similarly, a *majority* of the boards of directors of the five subsidiary corporations. Thus all corporate powers were reposed in *these two men.*"

After running down the line of descent from the parent corporation at Chicago to its Philadelphia offsprings, the Reading line, and the lines elsewhere, the court said:

> "The system made its profits from interest on money loaned and from the sale of stock of the parent corporation and of 'gold notes' of that corporation—unsecured promissory notes payable in gold—and gold notes of Trustee systems in various cities, in this case Trustees of Philadelphia, guaranteed by the parent corporation. Money acquired from the public flowed through the system in this way: The Truscos were supplied by the parent corporation in Chicago with money with which to make loans to the public," etc.

A veritable spider-web of corporations was built up, like the H. M. Byllesby & Company, Standard, Byllesby Engineering and Management Corporation, and numerous other corporations. Similar to the practice of the Standard in its dealings with the Deep Rock, the court said:

> "The precise position of the Trustees of Pennsylvania and Trustees of Philadelphia as money earners in the system, is, except as to the sale of notes, a little vague. But it is very clear that by reason of the identity of officers and of a majority of the directors in all the corporations, those officers could at will, *according to the money needs* of the parent corporation or for any other reason, keep one, or another, or all of the underlying corporations solvent or insolvent."

The court sustained the trial court's conclusion that the corporations constituted a *unitary system,* and among other things said:

> "But the court will not accept the independence of these several corporations from the mere fact that they were separately created. It is bound to regard the uses *to which they were put* in the huge financial scheme, examine the part they were *made to play by powers* equally controlling upon all of them and determine whether

the things they did were done separately for themselves or jointly for others. The court must, as it may, determine whether the five corporations were separate entities or were mere departments or agencies of the parent corporation. It must look and see whether in fact all these corporations were one, and whether there was that identity which lifts them out of the law of separate entities. We surmise that it was to avoid this very thing that the highly complex corporate structure of the scheme and the capital structure of the corporate units were created. The corporate and capital structure of the Pennsylvania group fairly bristles with legal obstacles to invasion by creditors or disturbance by stockholders. If the structure as originally conceived is left undisturbed, the receivers for the parent corporation can do very much as the parent corporation itself did before the receivership, that is, *drain off assets from the subsidiaries* and dispose of them without ancillary receiverships to guard local assets and watch over local creditors, thus leaving the local corporations financially dry and compelling their creditors to betake themselves to Chicago.

"It is recognized in principle that the fiction of corporate entity may be disregarded where one corporation is so organized and controlled and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of another corporation. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic & Commerce Association*, 247 U. S. 490, 38 S. Ct. 553, 62 L. ed. 1229; *In re Rieger, et al.*, (D. C.) 157 F. 609; *Brou[illegible]. Pennsylvania Canal Co.*, (C. C. A.) 235 F. 669; *Brown* v. *Pennsylvania R. Co.*, (C. C. A.) 250 F. 513; *Industrial Research Corporation* v. *General Motors Corporation*, (D. C.) 29 F. (2d) 623, 625; *Central Republic Bank & Trust Company* v. *Caldwell*, (C. C. A.) 58 F. (2d) 721. Through long practice courts have not hesitated to disregard the doctrine of corporate entities when the facts justify it. Although we know of no instance in which it has been done in matters of receivership, we cannot see

why the same power does not exist in a court or wh
the law does not impose upon a court the same duty i
a receivership matter when, as here, the facts are sub
stantial enough to justify, indeed to compel, a findin
that the five corporations were so identified with th
parent corporation *as to be a part of it*. Being of opin
ion that the law makes no exception of receivership
we tear asunder the legal maze of corporate fiction i
which they have enveloped themselves and observin
that the six corporations were not merely related b
stock ownership but, *like wheels in a machine*, were s
closely meshed that all functioned together, we fin
from the bills that in legal effect they were one, a fin
ing in consonance with the casual statement of the a
torney for the parent corporation at the hearing th
'the whole thing from Alabama to Pennsylvania is rea
ly one company'."

In *Dillard & Coffin Co.* v. *Richmond Cotton Oil Co.*, 1
Tenn. 290, 204 S. W. 758, the court approved the rule
contend for in the following language:

"The officers of Planters' *made daily reports*
the Richmond of each transaction which it had. T
general mana[illegible] of the Richmond understood and
testifies that the business of the Planters' was the bu
ness of the Richmond, and it *paid the financial* oblig
tions of the Planters' on more than one occasion. T
relations between the two corporations was not a sec
with the trade. The Richmond conveyed the gins s
uated in Missouri to the Planters' without the payme
of any other consideration than the delivery to it
the stock of the Planters'. It financed the operations.

"We think there can be no doubt but what, as
tween the two corporations, the properties held by t
Planters' were the properties of the Richmond. T
organization of the Planters' was a mere convenie
or possibly a device of the Richmond for the *furth*
ance of its business activities. The proposition made

Sugg to the Richmond before the organization of the Planters' involved no personal liability upon the part of Sugg, or the receipt of any substantial consideration by the Richmond for the properties which it was proposed to convey to the Planters'. *In equity the situation as between the Richmond and the Planters' was as though the Planters' had not been organized.* If the Planters' should earn sufficient profits to pay for the stock which Mr. Sugg might desire to buy, the ownership of the properties conveyed to the Planters' might finally pass to the Planters'; but if, at any time, Mr. Sugg should demand of the Richmond that it buy back the stock which he held, the agreement referred to required that company to do so. If Mr. Sugg should desire to buy stock the agreement required the Richmond to advance to Sugg par value for the stock. It also required the Richmond to finance the operations of the Planters'. This is what it did before the organization of the Planters'.

"It is said in defense that this transaction was illegal and *ultra vires* the powers of the Richmond. However this may be, we do not consider it important to decide. The fact remains that the Planters' was completely dominated and controlled by the Richmond. It was so understood both by the Richmond and by the Planters'. They intimate the promoter's agreement between the Richmond and Sugg necessarily involves the control and operation of the Planters' when organized by the Richmond. It is well-settled law in this state that when such a state of facts exist, the dominating corporation is liable for the debts of its dummy. *Towles & Co.* v. *Miles*, 131 Tenn. 79, 173 S. W. 439; *McDonald, Shea & Co.* v. *Railroad*, 93 Tenn. 281, 24 S. W. 252; *Madison Trust Co.* v. *Stahlman*, 134 Tenn. 402, 183 S. W. 1012. * * *

"The only thing that is supposed to make a defense between the case stated and the case at hand is the supervention of the legal entity of the Planters'. This entity is a fiction of law merely and when it is con-

trolled and dominated by another corporation, cour of equity disregard the fiction of law and decree accor ing to the merits of the case. So we hold that the Ric mond Cotton Oil Company is liable to complainant f its debts."

In *Platt* v. *Bradner Co.*, 131 Wash. 573, 230 Pac. 63 the court sustained the rule in the following language:

"It is also well-settled law that, while in general, corporation is a separate legal entity, neverthele when one corporation *so dominates and controls a other as to make that other a simple instrumentality adjunct to it*, the courts will look beyond the legal fi tion of distinct corporate existence, as the interests justice require; and where stock ownership is resorte to not for the purpose of participating in the affairs the corporation in the customary and usual manner, bu for the purpose of controlling the subsidiary compan so that it may be used as a mere agency or instrume tality of the owning company, the court will not pe mit itself to be blinded by mere corporate form, bu will, in a proper case, disregard corporate entity, an treat the two corporations as one. 1 Fletcher, Cyc. Corporations, p. 63, Sec. 45; *Id.*, 1921 Supplement, Vo 10, p. 11, Sec. 45; *Spokane Merchants' Ass'n* v. *Cle Clothing Co.*, 84 Wash. 616, 147 P. 414; *Clere Clothi Co.* v. *Union Trust & Savings Bank*, 224 F. 363, 140 C. A. 49; *Advance-Rumley Thresher Co.* v. *Geyer*, 4 N. D. 18, 168 N. W. 731. See, also, *In re Eilers Mus House*, (C. C. A.) 270 F. 915; *Id.*, (C. C. A.) 274 F. 33 *Luckenbach S. S. Co.* v. *W. R. Grace & Co., Inc.*, (C. A.) 267 F. 676; *Hunter* v. *Baker Motor Vehicle Co.*, (D C.) 225 F. 1006.

"*The above cases cite many other cases sustainin the principle here announced, but they are too numer ous to extend this opinion by citing them all.* We hav our own cases of *Mitchell* v. *Lea Lumber Co.*, 43 Wash 195, 86 P. 405, 9 L. R. A. (NS) 900, 10 Ann. Cas. 231 *Roberts* v. *Hilton Land Co.*, 45 Wash. 464, 88 P. 94

These cases follow the same principle as was followed in the *Clere Clothing Company* case, *supra.*"

The railroad "single system" rule applies to the Deep Rock and the Refining Company in that they were operated by the Standard as a unit—a single system—and certainly held out to the public as such in the prospectus heretofore discussed.

Powell on Parent and Subsidiary Corporations, page 68, discusses the "single system" rule. He says:

"In *Davis* v. *Alexander,* 269 U. S. 114, 70 L. ed. 186, the Supreme Court upheld a judgment rendered against the agent of the Director General of Railroads under the Transportation Act during the war. In effect the judgment was against the parent railroad company for negligence committed by a subsidiary. The court simply said:

> 'Where one railroad company actually controls another and operates both as a *single system,* the dominent company will be liable for injuries due to the negligence of the subsidiary company.'

"No facts showing the method of operation as between the two corporations are stated in the report.

"The two most frequently cited cases in this group are *Lehigh Valley R. Co.* v. *Dupont,* 128 Fed. 840, and *Lehigh Valley R. Co.* v. *Delachesa,* 145 Fed. 617, both decided by the United States Circuit Court of Appeals for the Second Circuit and both cited with approval by the Supreme Court in the *Davis* case, just mentioned. In each case the parent railroad corporation was held liable.

"In the *Dupont* case the Lehigh Valley Railroad Company was sued for damages for the death of the plaintiff's testator on a line operated by the Easton & Amboy Railroad Company, a branch line of the Lehigh Valley system. This company had been operated and managed by its own officers and agents since 1893, at

which time a lease of its lines to the defendant had been judicially declared illegal under a decree which ordered that it resume possession of its railroad properties and operate them by its own officers and agents. Since that time the entire capital stock of the Easton & Amboy Railroad Company had been owned by the Lehigh Valley Terminal Railroad Company and the entire stock of this latter corporation had been owned by the defendant. The directors of the Terminal Company had been elected by vote of the defendant, and the officers and agents of the Easton & Amboy Railroad Company had been elected by the vote of the Terminal Company. The freight and passenger business between the two corporations had been done upon a mileage basis, the charges being prorated and each one receiving its proportion. The same persons were the Superintendent and General Passenger Agent, respectively, of the Easton & Amboy Railroad Company and of the defendant. In the advertisement and timetables of the defendant the Easton & Amboy line had always been treated as part of the railroad of the defendant, and the cars, conductors and other employees had been apparently those of the defendant, the cars being lettered in its name and the conductors and employees wearing its initials upon their uniforms. The defendant was found liable and it was held that the arrangement between the two lines constituted them partners for the business of through traffic. The court said:

> 'The title to the franchises, privileges, and property of the Easton & Amboy Railroad Company was vested in that corporation, and the railroad upon which the deceased was killed was operated and maintained financially and physically by that corporation; but the potential and ultimate control of all its property and business affairs was lodged in the defendant, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit.'

"The actual decision was placed on the ground of

the dominent carrier's obligation under the contract of carriage beyond its lines, the subsidiary being merely its agent.

"In the *Delachesa* case the same part of the Lehigh Valley system was involved. In this case the plaintiff brought a negligence action for injuries received while working on a dock owned by the Lehigh Valley Terminal Railroad Company but leased to the Easton & Amboy Railroad Company. The court again held that the Lehigh Valley Railroad Company was liable on the ground that the entire property was operated as part of one system under the control of that corporation. Referring to the method of operation after the judicial termination of the Easton & Amboy lease referred to above in the *Dupont* case, the court said:

> 'The secretary of the defendant testified that the only difference, so far as the actual operation of the roads was concerned was that before the decree the records of all the transactions of the two companies had been kept in one set of books, and since that time they had been kept in two sets of books; and that thereafter until the time of the accident the same person was president of both, the same person the general manager of both, the same person the superintendent of both, and the same persons were the heads of the operating departments of both.'

"The court then went on to say that at the trial 'apparently it was difficult if not impossible for the plaintiff to ascertain whether the Terminal Company, the Easton & Amboy Company, or the defendant itself, was responsible for his injuries,' and that this inquiry was unnecessary because it merely was directed to whether the defendant 'should be called upon to pay out of one or another of its several purses.'

"In *Pennsylvania R. Co.* v. *Anoka Nat. Bank,* 108 Fed. 482, the United States Circuit Court of Appeals for the Eighth Circuit affirmed a judgment against the parent corporation for a loss of goods in shipment over

the subsidiary's line. The court called attention to the fact that 'in folders, in advertisements and in various other ways the defendant represented to the public' that the subsidiary 'was a part of its "system" and in some instances, "a division".' It then said that 'upon the testimony the jury might well find that the corporate existence' of the subsidiary '*was maintained by and for the use of the defendant company, and that the defendant company held it out to the world as a part of its system, for whose acts it was responsible'.*"

It is *not necessary* that the directors and executive officers of the subsidiary *be executive officers* and members of the board of directors *of the parent company or any allied corporation.*

Powell on Parent and Subsidiary Corporations, page 17, says:

"The Instrumentality Rule cannot be circumvented by equipping the subsidiary with directors or officers who are ostensibly, but not actually, independent of the parent corporation. If, in fact, *they took their orders* from the parent corporation or someone who controlled it, and acted in the interest of the parent corporation rather than the subsidiary, the record names and formal set-up will not avail. The result is the same where the same persons are directors of both corporations, but act in the interest of the parent corporation.

"*Direct proof of this affirmative subserviency of the subsidiary's officers is conclusive of the case against the parent corporation, in so far as the Instrumentality Rule is concerned.* But such direct proof is not often forthcoming. Usually this subserviency is an ultimate fact to be deduced from all the facts of the case and the other elements previously discussed indicate the circumstances which often are available for this purpose."

Powell also says, page 37:

"If control over the subsidiary is effected, not by di-

rect ownership of its stock by the dominant corporation, but by ownership in the hands of persons who by like means control the dominant corporation, the same results will follow. *The particular form of the control is immaterial.*"

Powell cites in support of the above:

Luckenbach S. S. Co. v. *W. R. Grace & Co.*, 267 Fed. 676 (4th Cir. Apps.);

In re Watertown Paper Co., 169 Fed. 252 (2nd Cir. Apps.).

"If the necessary degree of control is shown, the court will reach right through the entire chain."

—See Powell on Parent and Subsidiary Corporations, page 37, with authorities cited.

Before citing and quoting from the next case, we call attention again to the prospectus, Trustee's Exhibit "C", which states as a fact that the Deep Rock "is a balanced, self-contained *unit* of the petroleum industry, embracing fully within its own organization *complete* properties and *facilities* for the production, *refining*, transportation and marketing of its products." Not only that, but the prospectus states that the Deep Rock refinery "is a completely equipped plant, * * * and includes a modern cracking plant," etc. This statement, over the signature of Mr. O'Brien, President of the Standard, Deep Rock, H. M. Byllesby and Company and Byllesby Engineering and Management Corporation, is an unequivocal admission that the Refining Company is a department of the Deep Rock or otherwise it could not be a unit as stated in the prospectus.

Thus in *Advance-Rumely Thresher Co.* v. *Geyer*, 40 N. D. 18, 168 N. W. 731, the court laid down a rule exactly fitting the facts in this case and ignored the separate corporate entity. The court said:

"It would seem from the foregoing that the or-

ganization and business of the M. Rumely Company and Rumely Products Company served to accomplish the same purpose, to-wit, the *manufacture* and *sale* of certain articles, conceded to be mostly farm machinery; *this was the general purpose of the business as a whole.* The organization of the Rumely Products Company was only an element to *assist* in carrying out the purposes of the M. Rumely Company, and to *facilitate* and assist in the marketing of the articles manufactured by the M. Rumely Company, and was, in effect, a *part of the same* business. If the M. Rumely Company and Rumely Products Company were doing their *respective parts* for the purpose of accomplishing the *purposes* of the general business they were, so far as the *public* is concerned, one and the same party. If it is a fact that the stockholders and *directors* of the M. Rumely Company and the Rumely Products Company *are entirely separate and distinct,* this fact alone, *so far as the public is concerned,* does not make them absolutely independent concerns if the results and whole compass of their work and the effect of the organizations is to accomplish *one purpose.*"

Point Three.

The Bylleaby Engineering and Management Corporation's supervision fee of $1,219,034.83 was unearned and unjust and all or that part charged since February 24, 1928, to-wit, $720,000.00, should be disallowed and the 7 per cent compound interest charged thereon by Standard on its open account should also be stricken out and disallowed.

(a) For a history of the Engineering and Management Corporation's organization, financial structure, assets and purposes, see page 4 in this abstract and brief. Suffice it here to refer to the fact that, as repeatedly stated by the Standard in its annual reports, the Engineering and Management Corporation was a "wholly owned subsidiary of Standard" whose "entire earnings accrued to Standard

Gas and Electric Company." (O'Brien, Tr. 6) That it was a mere agency and department of the Standard is clear under the evidence and law applicable thereto.

These two facts stand out like sore thumbs:

(1) No doubt the Management Corporation was organized to enable Standard to exaggerate and pad the annual expenses of its subsidiary utility corporations in order to justify high public service rates charged the public for gas and electricity and at the same time turn back to Standard through the Management Corporation dividends out of the swollen expenses of its subsidiaries. *It used the same "racket" on the Deep Rock.*

As said in Pond on Public Utilities, Sec. 576, "That the necessary *expenses* of *maintenance and operation* must be met out of the proceeds received from the service of the municipal public utility is an absolute necessity which the courts have never questioned."

In discussing the basis for determining reasonable public utility rates, Wyman on Public Service Corporations, Vol. 2, Sec. 1151, said:

> "Reckless and unnecessary expenditures, not legitimately incurred in the actual operations of the company, cannot be allowed."

In *Chicago & G. T. R. Co.* v. *Wellman,* 143 U. S. 339, 36 L. ed. 176, the court had before it an appeal from the Supreme Court of Michigan reversing the judgment of the trial court enjoining the enforcement of certain railroad rates. What Justice BREWER said, speaking for a unanimous court, is peculiarly apropos, Justice BREWER said:

> "On the very day the act went into force the application for a ticket is made, a suit commenced, and within two months a judgment obtained in the trial court; a judgment rendered not upon the presentation

of *all the facts* from the lips of witnesses, and a ful inquiry into them, but upon an *agreed statement* which precludes inquiry into many things which *necessarily* largely enter into the determination of the matter in controversy. A single suggestion in this direction. It is agreed that the defendant's operating expenses for 1888 were $2,404,516.54. Of what do these operating expenses consist? Are they made up partially of *extravagant* salaries; fifty to one hundred thousand dollars to the president, and in like proportions to subordinate officers? Surely, before the courts are called upon to adjudge an act of the Legislature fixing the maximum passenger rates for railroad companies to be unconstitutional, on the ground that its enforcement would prevent the stockholders from receiving any dividends on their investments, or the bondholders any interest on their loans, they should be *fully advised as to what is done with the receipts and earnings of the company* for if so advised, it might clearly appear that a prudent and honest management would, within the rates prescribed, secure to the bondholders their interest, and to the stockholders reasonable dividends. While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, *by exorbitant and unreasonable salaries,* or in some other, *improper way, transfer its earnings into what it is pleased to call 'operating expenses'.*"

It is a well-settled rule that a public service corporation is entitled to a fair return on its invested capital and in fact, such a return as will invite new capital. Actual cost of a plant is taken as a basis. But, as said by Wyman on Public Service Corporations, Vol. 2, Sec. 1084:

"It should be clear, however, that if the contract under which the works are constructed is collusively made, the company cannot later rely upon the contract price as the true measure of actual cost. For instance

it has not been uncommon, in the past at least, for the promoters of a public service company to organize a construction group, which was thereafter paid extravagant prices. If such were shown to be the facts, a court today would have no hesitation in going behind the returns to discover what would have been a proper cost."

(2) The Engineering and Management Corporation was as completely *a dummy and fraudulent device as the Transit Company was a dummy and device of the Brewing Company in United States* v. *Milwaukee Refrigerator Transit Co.,* 142 Fed. 247, 255, *in which Judge Sanborn, speaking for the court, held that the Transit Company was a mere dummy used to obtain rebates from railroads.* Likewise, the Refining Company and the October 1, 1925, and October 1, 1930, leases were devised and used to divert Deep Rock profits to Standard.

As said by Judge SANBORN in *United States* v. *Milwaukee Refrigerator Transit Co.,* 142 Fed. 247-255:

"If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. * * *

"Applying the rule here laid down to the circumstances shown to surround the brewing company and transit company, can it be doubted that there really is, in substance and effect, an identity of interest, or that the brewing company, considered as an association of individuals, really owns and fully controls the transit company? Or that the payment of the eighth or tenth of the rate is in reality, and in some form, a payment to, or for the benefit of, the shipper? I think sufficient is alleged to show this. Moreover, it clearly appears that

the shipper practically controls the transit compa
and I think this shows a sufficient identity of inte
among the shareholders of both in these repayme
to make them rebates, if paid and received with unl
ful intent. It is said that the procurement of the s
ments through the contract is the mere soliciting
them for the carriers, for which they are lawfully
thorized to pay a part of the rate in order to get
business; and the transit company, owning a large n
ber of refrigerator cars, and wishing to keep them
ployed, simply gives the freight to those compet
shippers who will make the best terms, the business
ing of great volume, and the sums paid for freig
large. But this theory of innocence is exploded by
fact, as alleged (whatever the actual proof may sho
that the transit company is a mere separate name
the brewing company, being in fact the same collec
of persons and interests. Assuming the truth of
averments, the device adopted is *'neither new, nor
serving of new success'.*"

Although the Deep Rock was organized on May
1919, no supervision or management charges were m
by the Engineering and Management Corporation u
after C. B. Shaffer and his associates were eliminated fr
the Deep Rock. Shaffer's elimination took place in Ma
1921, as shown by Claimant's Exhibit 1. (R. Vol. 2, p. 6
The first charge for supervision fees was made in Dec
ber, 1921 (see Exhibit "A" to Standard's claim, and p
4 of Exhibit "C" to Knourek's answer to the 27th in
rogatory). The charge in December, 1921, "supervision
for 1921, $99,034.83", was 1¼ per cent of Deep Rock's gr
earnings. (R. Vol. 3, p. 83; Exhibit 2 to Kerr's answ
to the 25th interrogatory.) At that rate, 1¼ per cent
gross earnings, the total supervision fees for the ye
1919 to 1932 inclusive would have been $2,404,836.57.
the supervision fees for years subsequent to 1921 were
fixed upon the basis of a percentage of either the gross

net income of the Deep Rock, although the charges against Standard's other subsidiary and affiliated corporations were on a percentage basis. They were arbitrary and based upon what the Standard considered "the traffic would bear."

Exhibit 2 (R. Vol. 3, p. 83) to Kerr's answer to the 25th interrogatory shows that the next supervision fee, the one for 1924, was billed by the Management Corporation to the Deep Rock on December 31, 1924, "Fee covering general supervision of your *property* for the twelve months ending December 31st, 1924, $100,000.00," which is perfectly ridiculous in view of the fact that the Management Corporation never did supervise Deep Rock's property. The next bill for supervision fees was sent by the Engineering and Management Corporation under date of December 25, 1925, and entitled "*Supervision of your property for the year 1925*, $100,000.00." As no supervision fee was charged for the years 1922 and 1923 we are prompted to inquire, "*Who did supervise the Deep Rock's property for those two years?*"

On December 31, 1926, the Management Corporation sent Deep Rock a bill entitled "Supervision of your *property* for the year 1926, $200,000.00"—twice the fee for 1925 supervision. This double fee was no doubt charged because Standard figured Deep Rock was able to pay more in 1926 than it was in 1925 because it made more money in 1926, although there is *not the slightest evidence* that the Management Corporation *did any more work* in 1926 than it did in 1925 or any other year.

On December 31, 1927, the Management Corporation sent Deep Rock a bill for "General Supervision fees for the year 1927, $20,000.00," although, as shown by Standard's Exhibit 13, Deep Rock's net operating profits for the year 1927 were almost half as large as they were for the year 1926, and Standard's Exhibit 14 shows that its net profits

for the year 1927 were more than one-third of its net pro for the year 1926.

On December 31, 1928, the Management Corporat sent the Deep Rock a bill for "Supervision fees for the y 1928, $200,000.00," although the Deep Rock's net ope ing profits for the year 1928 (see Standard's Exhibit were only a little more than one-third over its net operat profits for 1927, and according to Standard's Exhibit 14 net profits for 1928 were less than one-third in excess of net profits in 1927.

On December 31, 1929, the Management Corpora sent the Deep Rock a bill for "Supervision fees for the y 1929, $200,000.00."

On December 31, 1930, the Management Corpora sent the Deep Rock a bill for "Supervision fees for the y ending December 31st, 1930, $200,000.00," although St ard's Exhibit 13 shows that Deep Rock's net operating e ings or profits for the year 1930 were not quite half its erating earnings for 1929, and according to Standard's hibit 14, Deep Rock's net earnings for 1930 were not one-third of its net earnings for 1929.

On December 31, 1931, the Management Corpora sent the Deep Dock a bill for "Supervision fees for year ending Dcember 31st, 1931, $100,000.00," althoug cording to Standard's Exhibit 14 the Deep Rock suffer net loss in 1931 of $146,215.42. *The management was n good that year.*

(NOTE: See Exhibit 2 to Kerr's answer to the interrogatory, R. Vol. 3, p. 83.)

These figures prove that two elements entered int management charges or fees, (a) *"how much the t would bear,"* and (b) *Standard's necessities.*

R. J. Graf testified on cross examination (Tr. 123-125) as follows:

Q. "Who fixed the amount of the charges or fees charged to the Shaffer Oil and Refining Company for services rendred by the Byllesby Engineering and Management Corporation?

A. The directors of the Byllesby Engineering and Management Corporation.

Q. Was there any written contract made at any time between the Shaffer Oil and Refining Company and the Byllesby Engineering and Management Corporation?

A. I don't remember whether there was a written contract or not.

Q. Will you have the record searched, and be able to state tomorrow whether or not there was any written contract, and if so, produce it here tomorrow for examination?

A. Yes, Mr. Ramsey.

Mr. Gibson: There was no contract, written or verbal.

The Witness: Well, there was a verbal contract.

Mr. Gibson: No contract covering any specified scale; merely an agreement that they would give them the benefit of all discounts they received, and charge them a reasonable fee.

Mr. Ramsey: It is admitted, then, that there was no written contract between the Shaffer Oil and Refining Company and the Byllesby Engineering and Management Corporation at any time.

Mr. Gibson: Covering its fees.

Mr. Ramsey: Covering its fees or charges for any services, purchasing pipe, or any other material.

Mr. Gibson: Yes, that is a fact."

No supervision fees were charged for the years 1922 and 1923. (See Exhibit "A" to Standard's claim.)

Deep Rock's net earnings according to Standard's annual reports.

1922	$ 2,005,0
1923	1,175,6
1924	2,438,6
1925	4,428,4
1926	6,045,5

(NOTE: See Standard's December 31, 1926 annual report, page 19. *Claimant's Exhibit 13 shows only $2,438,354.00 for the year 1924.)*

1927	3,006,7

(NOTE: See Standard's December 31, 1927 annual report, page 21.)

1928	4,037,6

(NOTE: See Standard's December 31, 1928 annual report, page 21.)

1929	4,045,3

(NOTE: See Standard's December 31, 1929 annual report, page 21.)

1930	2,695,2

(NOTE: See Standard's December 31, 1930 annual report, page 21. *Claimant's Exhibit 13 shows only $2,051,107.88.)*

1931	1,607,7

(NOTE: See Standard's December 31, 1931 annual report, page 21. *Claimant's Exhibit 13 shows only $1,007,755.63.)*

As Deep Rock was in receivership, Standard's De ber 31, 1932 annual report did not report Deep Rock's or gross income for 1932, *but Claimant's Exhibit 13 sh for 1932, $1,184,592.73.* Claimant's *Exhibit 13 shows fo year 1921* (not in Standard's reports), *$2,029,922.78.*

Thus it appears from Claimant's Exhibit 13 that the net earnings *before* deducting "interest charges," "amortization of debt discount and expense," and "appropriation for retirement and depletion" (see Claimant's Exhibit 14) for the years 1921 to 1932, inclusive, were *$33,456,068.74*.

Standard's annual reports for the years 1924, 1930 and 1931 exceed the amounts stated in Claimant's Exhibit 13 by $1,244,404.97, an unexplained discrepancy of no other importance except in so far as it shows Standard's disposition to exaggerate the value of its holdings and thereby mislead its stockholders and those contemplating becoming stockholders.

According to Kerr's testimony (Tr. 475-476) Claimant's Exhibit 13 is a "statement of the gross earnings, operating expenses and net earnings of the several departments (of the Deep Rock) from the period January 1, 1919, to February 28, 1933." This is "by totals at the end of each year," and "correctly recites the facts as disclosed by the books of the Deep Rock." (Tr. 476)

According to Kerr's testimony (Tr. 476), Claimant's Exhibit 14 shows the gross earnings, operating expenses and net operating earnings in total, also interest charges, amortization of debt discount, appropriations for depreciation and depletion, preferred and common stock dividends and balances carried to surplus, together with surplus at the beginning and end of each year, from January, 1919, to February 29, 1933.

Supervision fee charges as shown by Exhibit "C" to Knourek's answer to the 27th interrogatory.

Dec. 31, 1921...	$ 99,034.83
1922...	None
1923...	None
Dec. 31, 1924...	100,000.00
Dec. 31, 1925...	100,000.00
Dec. 31, 1926...	200,000.00
1927...	None
Feb., 1928 (for 1927)...	20,000.00
Dec. 31, 1928 (for 1928)...	200,000.00
Dec. 31, 1929...	200,000.00
Dec. 31, 1930...	200,000.00
Dec. 31, 1931...	100,000.00
Total.....	$1,219,034.83

Deep Rock's net earnings cording to Claimant's Ex it 14, after deducting $ 287,448.92 'interest charg $289,887.38 'amortizatio debt discount and expen and $14,447,920.64 'ap priation for retirement depletion reserve.'

1919.....	$ 696,03
1920.....	858,52
1921.....	425,38
1922.....	484,47
1923.....	25,41
1924.....	77,99
1925.....	1,461,91
1926.....	2,801,02
1927.....	980,00
1928.....	1,398,50
1929.....	1,365,43
1930.....	350,00
Total.....	$10,924,69
1931	$146,215.42—(Loss)
1932	95,426.45—(Loss)
1933	611,316.94—(2 mo
	$852,958.81—Total

Deducting the total losses, $852,958.81, from the t of the gainful years, $10,924,698.14, the net income was $ 071,739.33. (See Standard's Exhibit 14.)

(NOTE: Although the net income, according Claimant's Exhibit 14, for the year 1930, was $3 000.00, the Management Corporation, in December that year, charged a supervision fee of $200,000.00.

the year 1931, in the face of a net loss of $146,215.42, the Management Corporation charged a supervision fee of $100,000.00. These charges clearly indicate that either Standard's necessities also cut a figure, or that Standard was trying to get "its" before the crash.)

For what sort of services were these supervision charges made?

(a) Stock Transfer Service and Dividend Payments.

M. A. Morrison, Standard's Secretary and Treasurer and the Engineering and Management Corporation's treasurer and Vice-President, testified (Tr. 241-250):

Q. "Are you also connected with Byllesby Engineering and Management Corporation?

A. Yes, sir.

Q. In what capacity?

A. As Vice-President and Treasurer.

Q. How long have you been connected with these organizations?

A. *Since their organization,* the Standard Gas in 1910, the Byllesby Engineering in 1919.

Q. Previous to that time were you connected with H. M. Byllesby & Company?

A. Yes, sir.

Q. State whether or not you are familiar in general with the character of service which had been rendered since the purchase of the Shaffer properties by Byllesby Engineering and Managemnet Corporation to it.

A. I am.

Q. What in general has that service consisted of?

A. Well, particularly as it comes under my jurisdiction it has consisted generally of sending out of dividend checks, annual reports, notices of annual meetings, consisting of proxies and notices; the examination of ownership certificates that are presented with the payment of each semi-annual coupon, and, generally speaking, fiscal work of that character, stock transfers.

Q. Has Byllesby Engineering and Management Corporation acted as transfer agent?

A. Yes, sir.

Q. Well, is that for both common and preferred stock?

A. Yes, sir.

Q. Now, approximately how many dividend payments up on either common or preferred stock had been made through your office for Shaffer Oil and Refining Company since 1909, the date of its organization?

A. Well, dividends, when they were being paid, were being paid quarterly. They were not consecutive. About *thirty-six* quarterly dividends were paid.

Q. That is on preferred?

A. On preferred stock, yes.

Q. And how many on common, do you know?

A. Three.

Q. What was the date of the payment of the first preferred dividend?

A. October 25, 1919.

Q. And what was the date of the payment of the last dividend on preferred stock?

A. January 24, 1931.

Q. In the making of the payment of dividends, I wish you would tell just what your organization did?

A. Well, in the first instance the stock transfer department would prepare a list of those stockholders who were entitled to receive the dividend as of the record date. That list was then forwarded to the dividend paying department, who made computations of the amount of dividend due each stockholder, and when that list was completed, the checks were run through a machine which we have had specially built for our purpose, in which the name of the stockholder and the number of the dividend and the amount of the check were imprinted. It was subsequently *put into an envelope*, either an addressed envelope in the early days, and subsequently an outlook envelope, and put in the mails for distribution. In the meantime, the bookkeeping department

would verify from the dividend department the amount of money that was due on each particular quarterly dividend, and transmit that amount of funds either by cashier's check or by wire to the Guaranty Trust Company of New York, who was the disbursing agent of the funds.

Q. Whose check would that be, sent to the bank in New York?

A. It might be *Standard Gas and Electric Company's check, or Deep Rock's check.* But in any event, it was sent to the Guaranty Trust Company of New York, to be credited to the account of the Shaffer Oil and Refining Company preferred stock dividend account, and all checks drawn against that account were Shaffer Oil and Refining or Deep Rock Oil, as the case may be, checks signed by one of the assistant officers in Chicago.

Q. Those dividends were ordinarily what amount, that is, what amount per share?

A. $1.75 for each share.

Q. That is $7.00 a year?

A. $7.00 per annum.

Q. What other service in connection with the payment of this dividend was rendered by your company? Were the checks returned to you?

A. The checks were returned to us, and verified against the stockholders' list, which was kept in this office, so that any checks that were mislaid or stolen, or lost, might be accounted for if claim was made for them.

Q. In connection wtih the payment of this dividend, what charges, if any, were made against Shaffer Oil and Refining Company by Byllesby Engineering and Management Corporation?

A. None whatever.

Q. Was that service included in the service for which bills had been rendered, and which is mentioned in this account that is sued on here?

A. Yes, sir.

(NOTE: Management charges and fees.)

Q. Now, you also say that you keep a stock register?

A. Yes, sir.

Q. How many preferred stockholders, approximately, were there?

Mr. Ramsey: What year?

The Witness: I am not so sure I can give it to you by years, Judge. They generally ran about 1200 to 1500 accounts a year, each year.

Q. (Mr. Gibson:) And payments were made, not always regularly, but were intended to be quarterly.

A. Yes, sir.

Q. Four each year.

A. Yes, sir.

Q. Now, in the keeping of your stock record, did you keep a list of both the common and preferred stockholders?

A. Yes, sir.

Q. And was there any clerical force required to keep those registers up to date?

A. Yes, sir.

Q. What, if any, service was done by Byllesby Engineering and Management Corporation in the way of transfers of stock?

A. Well, all of the transfers that were effected in Chicago were done through the employees of the Byllesby Engineering and Management Corporation.

Q. Were there transfers that were recorded elsewhere than in Chicago?

A. There were some transfers made in New York, but a complete list of all stockholders, of all transfer agents, was kept in Chicago.

Q. State whether or not any specific charge was ever made against Shaffer Oil and Refining Company by your company for its services as transfer agent or for keeping the stock register.

A. There was not.

Q. Are you familiar with the *customary charges which are usually made by so-called TRUST COMPANIES* or

transfer agents in Chicago and other large cities for the keeping of stock registers, a list of stockholders, and for transferring stock?

A. Yes, they have a series of charges, depending upon the number of stockholders. The minimum charge is $500 per annum, which provides for the issuance of 500 certificates and the maintaining of 500 accounts per annum. For maintaining the additional accounts, there is a charge of fifty cents for each account.

Q. (Mr. Ramsey:) Per annum?

(NOTE: Standard did not even offer to prove the number of annual transfers of Deep Rock stock which was never active. Assuming there were 1000 transfers per year it would amount to only $750.00 per year. As the Management Corporation never made any charges for management or supervision services until December, 1921, after Shaffer got out (see 8th page of Exhibit "C" to Knourek's answer to the 27th interrogatory) we would have not over a total (at a Trust company's rate) of $8,500.00 for the eleven years and three months —the period between December, 1921, and February 28, 1933.)

A. Per annum. For furnishing reports of daily transfers to co-transfer agents, there is a charge of $200 per annum. And each transfer agent charges for the posting of a stock certificate issued by a co-transfer agent at the rate of ten cents per certificate. Also there is a charge made by the *trust companies* for stockholders' lists at the rate of $25 per 1000 names.

Q. (Mr. Gibson:) What charge do they make for transferring the stock?

A. I think the transfer charge is included in the memorandum I just read, the $500 they charge per annum provides for the issuance of 500 certificates, and then all over that up to a certain number they charge fifty cents each.

Q. And fifty cents for each account for the year, whether there is a minimum or not.

A. After the minimum of 500.

Q. Have you any method of determining the approxim cost of the necessary preliminary steps leading up the payment of a dividend by check, including the pr aration of the necessary checks or receipts for rem tance, and the preparation of the check, and mailing out, and the other things necessary, including the checking of the account after the check has pass through the bank on which it is drawn?

A. The only mode of comparison we have as to what would cost any one company to issue or send out div dend checks is the charge made by the banks whe they, as they sometimes do, handle the *dividend check* for which they are transfer agents; and I think th charge at the present time is 12½ cents a check. At on time here a few years ago it was 20 cents a check. Base on the figure of 12½ cents a check, the dividend check we have sent out for which we have made no charge t the Shaffer would have cost them *$17,200.* That is th total.

(NOTE: Add this to the $8,500.00 stock transfe services, which makes a total of $25,700.00.)

* * * * * * * *

"Checks that are deposited in the dividend account sometimes it is done by wire, sometimes it is done by five or six of the different companies being involved sending a wire for the sum of money, and by wire instructions telling them how to *distribute* it on their books. As an example, Mr. Martin, here is a check dated January 24, 1931, of the Standard Gas and Electric people to the Continental Illinois Trust & Saving Bank for $2,863,280.50.

Q. (Mr. Martin:) What does that represent?

A. That was to be wired by the Continental Illinois Bank & Trust Company to the Guaranty Trust Company of New York to be credited to the *various dividend accounts, including Deep Rock Oil Corporation preferred stock dividend account, of $87,500.*

Q. (Mr. Gibson:) That was advanced for Deep Rock by Standard for use in paying its preferred dividend?

A. Yes, sir.

Q. Was there any saving in that manner of transfer over the ordinary remittance by checks?

A. Well, there was at one time, but since Washington does not allow any interest on bank deposits, there is no saving now. Ordinarily we used to get two per cent on our bank balances, but now no interest is allowed, so the two or three days saving of interest over mail by wire is of no consequence.

Mr. Ramsey: Who got the two per cent?

A. Whose-ever money was used.

Q. In that case, for instance.

A. This was Standard's money that was drawn out of Standard's account.

Q. (Mr. Gibson:) You mean you would get your two per cent on daily balances until it was actually drawn out?

A. That's right.

Q. Is there any exchange charge on a remittance of that kind now by check?

A. No, sir.

Cross Examination by Mr. Ramsey.

Q. Those thirty-six quarterly preferred dividends, if I understand your testimony, were not all paid on the date they were due to be paid, is that right?

A. No. They were all paid on the date they were due to be paid, *but from 1923 to 1926,* you see, no dividends were paid."

After going into considerable detail in regard to the number of dividend checks sent out, both on common and preferred stock, Morrison further testified (Tr. 256-258):

Q. "All right. Now, no charge was ever made by the engineering and management company for all these services in regard to the payment of dividends.

A. Not a cent.

Q. Did the engineering and management company ever render any bill or statement for services to the Shaffer Oil and Refining Company?

A. Render a bill for services?

Q. Yes.

A. In this connection?

Q. Yes, sir.

A. No, sir.

Q. Did you ever render any bills to the Shaffer Oil and R fining Company or Deep Rock Oil Corporation for a of the services you have testified were rendered by t engineering and management company?

A. No, sir.

Q. These dividends that were deposited in the Guaran Trust Company of New York were either deposited b check drawn on the bank account of the Standard G and Electric Company, or the Deep Rock Oil Corpor tion?

A. That is possible, but it is hardly likely. General speaking, all of those funds were deposited by *Standa Gas and Electric Company.*

Q. And charged to the Deep Rock by the Standard Gas a Electric Company?

A. Yes, sir, with a description of the character of the pa ment.

Q. Did the engineering and management company rend *similar dividend and stock transfer service to the ut ity corporations* owned or controlled by the Standa Gas and Electric?

A. *Yes.*

Q. What fees were paid the Guaranty Trust Company New York on these dividend checks?

A. No fee.

Q. Who was your transfer agent in New York, that i Deep Rock's transfer agent?

A. I think the Guaranty Trust Company is, although I a not certain.

Q. Well, if it is now, or was at the time a report was prin ed, has it always been the New York transfer agent?

A. Yes, if it was at one time, it still is.

Q. There has been no change in the New York transfer agent?

A. No.

Q. Were the books of the Shaffer Oil and Refining Company kept by the engineering and management company?

A. No, sir. You mean the general books?

Q. The *general books were not kept by the engineering and management company?*

A. No, sir.

Q. What books did the enginering and management company keep?

A. *They kept a stock transfer book, a stock register book.* I think that's all the books we did keep.

Mr. Ramsey: I think that's all.

Mr. Gibson: That's all, Mr. Morrison."

TOTAL.

The total of all these services could not exceed $25,700.00, according to trust companies' customary rates stated by witness.

There is no evidence that it is customary for corporations of the size of the Deep Rock to employ trust companies to draw and mail dividend checks. It is a simple matter. No doubt these dividend checks were sent out by the Management Corporation as a means of advertising the whole Byllesby block of corporations. It appears (Tr. 256) that there was a shield printed on each check, on which appeared the words, "Byllesby, Pioneers in Public Service—Engineering—Finance Management." This shield was held out to the public as a symbol of solvency and prosperty of the whole Byllesb corporate block.

(NOTE: *1st:* Knourek's answer to the 21st interrogatory contains an itemized statement of charge Item No. 14 in Exhibit "A" to Standard's claim, entitled

"Sundry Expenditures, $1,087,569.57." (R. Vol. 2, p
118 and Vol. 3, p. 41, etc.) This itemized statemen
shows that from June, 1919, to February, 1933, the Con
tinental and Commercial Trust and Savings Bank o
Chicago acted as Deep Rock's registrar—stock regis
trar, at an annual fee of $200.00 and some years $150.00
that the Bankers Trust Company of New York, the Illi
nois Merchants Trust Company, Guaranty Trust Com
pany of New York, and Corporation Trust Company
acted as Deep Rock transfer agents and registrars, and
that the total amount for their fees and expenses from
June, 1919, to February, 1933, was only $13,859.21
which, in the absence of anything to the contrary, ought
to be controlling evidence that the $25,700.00 we sugges
as a total allowance is more than reasonable—exceed
ingly liberal.

2nd: Knourek's answer to the 100th interrogatory
shows that Standard charged Deep Rock with manage
ment supervision fees in the sum of $499,034.83 for the
years 1921 to 1926, inclusive, with 7 per cent compound
interest thereon in the sum of $46,489.64, making a total
of $545,524.47. (Ex. C, R. Vol. 3, p. 30, and Vol. 2
p. 134.) An examination of Knourek's answer to the
64th interrogatory discloses that these engineering and
management supervision fees constituted no part of
Standard's open account balance of $6,836,195.85 on
February 24, 1928. Of the $499,034.83, $199,034.83 was
charged Deep Rock on December 31, 1921, and Decem
ber 31, 1924, and paid on April 30, 1926, out of the pro
ceeds of Standard's purchase of $8,000,000.00 of Deep
Rock's preferred stock and the proceeds of the sale of
Deep Rock's two-year six per cent notes for $7,500,
000.00. (See Knourek's answer to the 66th interroga
tory.) $300,000.00 of the $499,034.83 Engineering and
Management Corporation supervision fees and seven
per cent compound interest were paid by Deep Rock
on December 31, 1926. (R. Vol. 2, p. 134) It also ap
pears from Knourek's answer to the 100th interroga
tory that of the total of $1,219,034.83, Standard charged
Deep Rock after February 24, 1928, as Management

Corporation supervision fees, the sum of $720,000.00, with seven per cent compound interest thereon, none of which has been paid. It is clear that the $499,034.83 supervision fees charged Deep Rock up to and including December 31, 1926, and paid by Deep Rock on April 30, 1926, and December 31, 1926, were unjust and unearned charges. This makes it clear that the entire $720,000.00 supervision fees, with interest thereon, charged since February 24, 1928, should be disallowed *in toto* as the Standard had already received enormous fees for which no services of any value in excess of a few thousand dollars were rendered by the Management Corporation. Standard, having received many, many times the value of the Management Corporation's services, should not be allowed any further compensation.)

(b) Conferences and Advice on Financial Matters and Administrative Policy.

Substantially all of the Management Corporation's supervision fees were charged for consultation and advice regarding administrative policy and financial affairs.

The statutes of Delaware since 1915 (Section 9 of Delaware General Corporation Statutes) declare that "The business of every corporation organized under the provisions of this chapter shall be *managed* by a Board of Directors, except as hereinafter or in its Certificate of Incorporation otherwise provided."

It was therefore the duty of the Deep Rock's Board of Directors to manage its business, financial and administrative affairs. The Deep Rock's Board of Directors could not delegate this authority to the Management Corporation, and especially is this true in view of the fact that the Management Corporation's directors constituted a majority of the Deep Rock's Board of Directors.

To sustain the claim for supervision fees is to hold that

a corporation may subject itself to a claim for large
for services of its own directors in administrative ma
where they also act as directors of another corporatio
is perfectly farcical and absurd to claim that the
Rock's directors could as such ask themselves, as the
agement Corporation's directors, for advice. To adj
otherwise would be to hold that the individuals constitu
the Deep Rock's Board of Directors can put on the of
robe of the Deep Rock and inquire of themselves what
think about certain schemes and policies and instantly
robe and put on Management Corporation robes and an
the questions and decide the policy to be pursued.
would be "chameleon hue, ever changing ever new."

It was the duty of the individuals constituting the
Rock's Board of Directors to manage that corporation
outline its policies, both financial and administrative,
they could not delegate this duty to another corporatio
to themselves as the directors of another corporation.

An examination of Exhibits Nos. 12, 14 and 15 to
"Stipulation" (R. Vol. 2, pp. 312 to 338) shows the fol
ing directorship of the Deep Rock and the Engineering
Management Corporation, as well as the Standard:

1921. Two-thirds of the Deep Rock's directors were
agement Corporation directors, and three-fourth
the Deep Rock's directors were also Standard di
tors.

1922. Eight of the eleven Deep Rock directors were
agement Corporation directors, and nine of the
Rock directors were also Standard directors.

1923. Eight of the fourteen Deep Rock directors were
agement Corporation directors, and ten of the
Rock directors were also Standard directors.

1924. Eight of the fourteen Deep Rock directors were
agement Corporation directors and eight of the
Rock directors were also Standard directors.

1925. Eight of the fifteen Deep Rock directors were Management Corporation directors, and eleven were also Standard directors.

1926. Eight of the fifteen Deep Rock directors were Management Corporation directors, and eleven were also Standard directors.

1927. Eight of the fifteen Deep Rock directors were Management Corporation directors, and eleven were also Standard directors.

1928. Eight of the fifteen Deep Rock directors were Management Corporation directors, and twelve were also Standard directors.

1929. Seven of the fifteen Deep Rock directors were Management Corporation directors, and five were also Standard directors.

1930. Seven of the fifteen Deep Rock directors were Management Corporation directors, and six were also Standard directors.

1931. Seven of the fifteen Deep Rock directors were Management Corporation directors, and six were also Standard directors.

1932. Six of the twelve Deep Rock directors were Management Corporation directors, and six were also Standard directors.

1933. Six of the twelve Deep Rock directors were Management Corporation directors, and six were also Standard directors.

In *Northern Assur. Co.* v. *Rachlin Clothes Shop, Inc.*, 125 Atl. 184, the Chancellor said:

"A corporation being a purely metaphysical creature, having no mind with which to think, no will with which to determine and no voice with which to speak, must depend upon the faculties of natural persons to *determine for it its policies and direct the agencies* through which they are to be effectuated. The individuals within its organization who perform for it these

functions are generally its directors. In *this state th general corporation law,* under which the plaintiff belo was incorporated, provides that the directors shall ma age the business of every corporation created unde that law. The stockholders are without authority to d this. How can it be said that in performing this ma agerial duty for the corporation the directors act a agents? They act rather in the place of the corporatio itself. If we speak of an agent, we necessarily connote th complement of a principal. We further necessarily im ply some sort of instructions which define the scope the agent's authority. If this be so, when an agent a corporation is referred to, it means that some or has selected him, has laid out for him his task and de fined the limits of his authority. Who does this? Man festly the corporate creature, the *fictio legis,* does no because it cannot. Such activities require the exercis of functions which only natural persons possess. T suggest the idea, therefore, of an agent for a corpor tion is but to emphasize the existence somewhere in it organization of natural persons who are themselves ac ing not as agents but in the office of principal for th corporation itself. These persons who exercise for th corporation what we may call its primary power whether of the kind just mentioned or others, *formula and express for it its corporate will and purpose.* The are the ultimate source from which flows the authorit for all the corporate activity. They stand in the co poration's place and are, so to speak, its *alter ego* Machen in his work on the Modern Law of Corporation speaks of them as vice-principals and as analogous t managing partners or to the legislature of a state. Vo ume 2, secs. 1399, 1435. In Thompson on Corporation vol. 2, sec. 1787, the executive and administrative off cers are spoken of as 'inherent agencies,' as the 'mean of the hands and the head by which the corporatio normally acts.' In *Burrill* v. *Nahant Bank,* 2 Met (Mass.) 163, 35 Am. Dec. 395, the directors are cha acterized by Chief Justice Shaw as constituting th corporation. 'They do not,' says he, 'exercise a dele

gated authority in the sense in which the rule applies to agents.' Likewise in *Hoyt* v. *Thompson's Ex'rs*, 19 N. Y. 207, their powers are spoken of as '*original and undelegated.*' In *Goodspeed* v. *East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439, the directors are said to be corporate, and *constitute its* thinking and acting capacity. Expressions such as these may be gathered from other text writers and adjudicated cases. See Fletcher, Cyclopedia of Corporations, Vol. 3, secs. 1740, 1741. It is unnecessary to lengthen this opinion with an extensive collection of them. They are, so far at least as they may be said to be contemporaneous with the modern conception of the corporate nature, all to the same effect as those above referred to.

"This distinction between the acts of an individual acting as agent for a corporation and the acts of persons who in the exercise of undelegated powers act in the primary role of the corporation itself, is to be extracted from the following cases: *Varderman* v. *Penn Mutual Ins. Co.*, 125 Ga. 117, 54 S. E. 66, 5 Ann. Cas. 221; *American Soda Fountain Co.* v. *Stolzenbach*, 75 N. J. L. 721, 68 Atl. 1078, 16 L. R. A. (NS) 703, 127 Am. St. Rep. 822; *Glucose Sugar Refining Co.* v. *St. Louis Syrup & Preserving Co.*, (C. C.) 135 Fed. 540; *Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475."

Fletcher's Cyc. Corporations, Perm. Ed., Vol. 2, Section 505, says:

"The peculiar relation directors 'bear to the corporation and the owners of its stock grows out of the inability of the corporation to act except through such *managing officers and agents.* The corporation is the owner of the property, but the directors in the performance of their duty possess it, and act in every way as if they owned it.' 'A corporation is a thing or entity created by statute for a particular purpose; it can only act through its directors chosen by the stockholders and its officers chosen by the directors.' And the board of directors is the central power which authorizes the

executive agents of the corporation to enter into contracts and embark upon new business ventures. In determining the powers of a board of directors, the first matter to be considered is whether such powers are defined or limited by a general statute, the charter or by-laws.

"The articles of incorporation sometimes expressly provide that the board of directors shall have the whole charge and management of the property and effects of the company. So far as the statutes are concerned, they generally provide merely that the business of the corporation shall be managed by its directors, without further defining their powers. * * *

"'The board of directors have the widest powers. All of the various acts and contracts which a corporation may enter into are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens and contracts generally of the corporation. They appoint the agents, *direct the business, and govern the policy and plans of the corporation.* * * * They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it.' The authority of the directors in the *conduct of the business of a corporation* must be regarded as absolute when they act within the law. The board, unless restricted by charter or by-laws, *'has full control and management of the corporate business and property'.*"

Fletcher's Cyc. Corporations, Perm. Ed., Vol. 2, Sec. 507, also says:

"It has been held repeatedly that 'in corporate bodies, the powers of the board of directors are, in a very important sense, original and *undelegated. The stockholders do not confer, nor can they revoke those powers.* They are derivative only in the sense of being received from the state in the act of incorporation'."

Fletcher, Section 496, says:

"There is a limit, however, even to the power of the directors or trustees to delegate authority. As their authority to delegate is implied from the necessities in the management of the corporation, and from usage, so, also, it is limited by the same considerations. They cannot delegate *entire supervision* and control of the corporation to others, unless expressly authorized, for this is not only unnecessary and contrary to usage, but it is inconsistent with the charter or law which requires that they shall have general supervision and control of the corporation."

In *Colorado Springs Co.* v. *American Pub. Co.*, (8th Cir. Apps.) 97 Fed. 843-853, Judge THAYER said:

"Where, by statute, the power to transact the corporate business is thus lodged in the directors, it seems to be well established that the stockholders cannot enter into contracts either individually or while acting together at stockholders' meetings, unless, indeed, all of the stockholders are in attendance at such meetings."

It is equally well settled that although the Board of Directors may delegate certain powers to executive officers, they can not surrender or delegate their duties to the stockholders and creditors to manage and direct the corporation —that is, supervise the executive officers.

In *Martin* v. *Webb*, 110 U. S. 7, 28 L. ed. 49, the court said:

"It is their duty (meaning directors) to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable *control and supervision* of its officers. They have something more to do than, from time to time, to elect the officers of the Bank and to make declarations of dividends."

In *Briggs* v. *Spaulding*, 141 U. S. 147, 35 L. ed. 669, Chief Justice FULLER quoted with approval the opinion in

Percy v. *Millaudon*, (Ky.) 8 Mart. N. S. 68, wherein Judge PORTER said that

> "There are many things which, in their *management*, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction, renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. *The directors of banks, from the nature of their undertaking, fall within the class last mentioned*, while in the discharge of their ordinary duties. * * * In relation to these officers (meaning executive officers) the duties of directors are those of *control*, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case."

In *Dinsmore* v. *Jacobson*, 242 Mich. 192, 218 N. W. 700, the court quotes an opinion of Chief Justice BARTCH, of the Utah Supreme Court, wherein he stated:

> "The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, *or that the management of the banking business was in the hands of the cashier or other executive officer.*"

Fletcher's Cyc., Corporations, Perm. Ed., Vol. 2, Section 497, says:

> "The board of directors cannot delegate to subordinate officers or agents the exercise of discretionary powers which by the charter, *general laws*, by-laws, vote of the stockholders or usage is vested exclusively in the board."

See, also:

Briggs v. *Spaulding*, 141 U. S. 132, 35 L. ed. 662;
Rankin v. *Cooper*, 149 Fed. 1010;
Anderson v. *Akers*, 7 F. Suppl. 924-929.

R. J. Graf, a director and officer of the Standard, the Management Corporation and the Deep Rock since 1920, and connected with the Standard since its organization, testified as follows (Tr. 107-110):

Q. "Were you connected in any way with the Byllesby Engineering and Management Corporation?

A. Yes, sir.

Q. In what capacity?

A. *As a vice president and director.*

Q. State whether or not you are familiar with the services rendered by that company to the properties purchased from Shaffer and subsequently operated under the name of the Deep Rock Oil Company, or Shaffer Oil and Refining Company.

A. I was familiar with them.

Q. Generally, of what did those services consist?

A. Of *consultative conferences* with the officers and employees of the Shaffer Oil and Refining Company, the approval of all contracts which they proposed to enter into, the development of policy, both from a construction and a merchandising standpoint.

Q. What if any service was rendered in the way of financing the plans and projects of the Shaffer Oil and Refining Company?

A. The chief engineering and operation service was rendered by Byllesby Engineering and Management Corporation and Byllesby & Company was chief banker.

Q. Were you familiar with the character of the organization maintained by Byllesby Engineering and Management Corporation during the years from 1919 to 1931?

A. Yes, sir.

Q. I wish you would tell substantially what that organization consisted of.

A. It consisted of the highest class engineering, operating, advertising and financial ability I think that you could find in the country.

Q. What about purchasing agents?

A. And purchasing. I included that under the head of operating and engineering.

Q. Where were the offices of that company maintained?

A. The headquarters were in Chicago.

Q. Can you tell approximately how many men were employed in the Byllesby Engineering and Management Corporation during the years 1919 to 1930-31?

A. Well, they ran between 500, I think, and 750, that we had on our payroll either at Chicago or other places where we were doing work. The exact records of that we can give to you, the number employed at any definite date.

Q. How were they maintained, from what source was the money with which they were paid derived?

A. You mean from what source the Byllesby Engineering and Management Corporation received——

Q. Its income.

A. From engineering and operating advice *charged to the companies to which they rendered service.*

Q. Were you familiar with the charges which were made against Shaffer Oil and Refining Company?

A. Yes, sir.

Q. Upon what basis were those fees made, or determined?

A. By no rule of thumb. They were rendered after a conference of the officers of the company and a review of the work that they had done.

Q. Based upon their opinion of the fair value?

A. Yes, sir.

Q. In fixing those fees from time to time, state whether or not the conditions of the financial affairs of Shaffer Oil and Refining Company were taken into consideration.

A. At all times.

Q. In what degree did that affect the amount of the charge, in what way?

A. I think a record of the charges which were rendered

against the company will show that we moderated that charge in the years in which their income decreased.

Q. Did you say inceased or decreased?

A. I said decreased.

Q. Then you modified your charges, dependent upon the amount of the earnings.

A. Yes.

Q. As well as upon the service that you rendered.

A. Yes."

(NOTE: Here was a slip-up. In these so-called conferences it is difficult to tell whether the Deep Rock's committee was conferring with Graf, O'Brien, Lynch and others, as officers of the Management Corporation, or the Standard, as appears from the following testimony of Graf (Tr. 112-113):

Q. "Are you acquainted with Mr. Majewski and Mr. Francisco and Mr. John L. Gray and Mr. L. B. Riddle?

A. Yes, sir.

Q. State whether or not you recall the circumstances of their conferring with the officers of Standard Gas and Electric Company from time to time during the operation of the plant at Cushing by the company.

A. They conferred with us very frequently, Mr. Gray and his executive associates, at least once a month. and Mr. Majewski and others of the company from time to time during the month, during any given month.

Q. Well, about what subjects would they generally confer?

A. *Operating, financing, marketing conditions.*

Q. Where were the meetings of the directors of the Deep Rock or Shaffer Oil and Refining Company held?

A. Usually in *Chicago.*

Q. At what office?

A. The *office of Mr. O'Brien.*

Q. And how often did you say that those meeti
were ordinarily held?

A. With committees, Mr. Gray's committee, *abo*
once a month, and if any particular piece of busin
came up of any moment, *they would be oftener.*

Q. What were your particular functions in connecti
with this property?

A. *Purely financial.*"

It would appear from this testimony that the c
cers representing the Deep Rock, Standard and En
neering and Management Corporation sometimes l
their identity and are now unable to say whether a
particular time they were acting for the Engineeri
and Management Corporation or the Standard.)

Mr. O'Brien testified that in 1919 when they acqui
the Deep Rock, "*We knew nothing about the oil business*
that time." (Tr. 10)

As evidence that the Engineering and Managem
Corporation's officers had no practical knowledge of the
producing and refining business, Graf further testified
follows (Tr. 117-118):

Q. "Are you an engineer?

A. No, sir.

Q. Do you know anything about ope ating an oil refine

A. No, sir, except the financial end, Mr. Ramsey.

Q. Do you know anything about or have you had any
perience in the construction of Dubbs cracking plants,
any other sort of cracking plants?

A. No, sir.

Q. Have you ever had any experience in operating
leases and development for oil and gas?

A. Except putting my money in, sir.

Q. Well, that hasn't always been a very profitable
perience.

A. No, sir, it has not.

Q. Who was the *financial expert* of the Byllesby Engineering and Management Corporation?

A. *Well, we all who sat on the board thought we were experts in finance.*

Q. Who do you mean by 'all'?

A. All of the gentlemen who sat on the board of directors.

Q. Of the Byllesby Engineering and Management Corporation?

A. Yes, sir.

Q. Well, the directors of the Byllesby Engineering and Management Corporation were likewise directors of the Standard Gas and Electric Corporation, weren't they?

A. Yes, sir.

Q. And they were selected, that is, the directors and officers of the Byllesby Engineering and Management Corporation were selected or rather elected by the Standard Gas and Electric Company?

A. Yes, sir."

Graf also testified (Tr. 119-121, and 125-126):

Q. "Now, the main business of the Byllesby Engineering and Management Corporation was looking after the affairs of said subsidiary companies of the Standard Gas and Electric, engaged in the public utility business.

A. Yes, sir.

Q. The Byllesby Engineering and Management Corporation made a specialty of providing itself with experts who knew how to manage the engineering and business affairs of public utilities?

A. Yes, sir.

Q. Was there any member of the board of directors, or any officer or employee of the Byllesby Engineering and Management Corporation, who had had any experience in operating cracking plants or refineries, or developing oil properties?

A. Yes.

Q. Which one?

A. Mr. Huey had some experience with them.

Q. What are his initials?

A. Arthur S.

Q. He had been with H. M. Byllesby & Company sinc organization, hadn't he?

A. Yes, sir.

Q. He devoted practically all his time to public utili didn't he?

A. Well, practically all of his time, yes, except thes developments which he had undertaken.

Q. What oil developments did he ever undertake?

A. He had some oil properties in Kansas, Oklahoma New Mexico.

Q. Did he have it in corporate form, or in his indivi name?

A. Some were in corporate form, and others in ind ual's names.

Q. Did he ever drill a well?

A. I don't know whether he did or not?

Q. Did he ever operate a refinery?

A. I don't know whether he did or not.

Q. Did he ever operate or construct a cracking plant

A. I don't know whether he did or not.

Q. As a matter of fact, don't you know he never did any experience in either one of those lines?

A. I do not.

Q. He resided here in Chicago.

A. Not all the time. His residence was here, but he s most of his time in the field.

Q. The Standard Gas and Electric Company was inter in Oklahoma Gas and Electric, which had a fran to operate an electric plant and a gas plant in Oklal City, Oklahoma, didn't it?

A. Yes, sir.

Q. He spent a good deal of his time looking after the ness affairs of that company; didn't he?

A. Yes, sir. * * *

Q. (Mr. Ramsey:) included in the charges made by

Byllesby Engineering and Management Corporation against the Shaffer Oil and Refining Company, were any part of those charges for financial services?

A. Well, what do you mean by financial services?

Q. Well, assisting the Shaffer Oil and Refining Company in raising money, finances.

A. Well, not as such, no. But from time to time, as you know, the Standard Gas and Electric Company advanced extremely large sums of money for these various corporate purposes of the Shaffer and Deep Rock Company.

Q. But what I want to know is this. Was there included in the charges made for the Standard Gas and Electric Company against Shaffer Oil and Refining Company for services, any part thereof on account of financing or advising Shaffer Oil and Refining Company in regard to its financial affairs or its financial policy?

A. *That was all included in the management fee.*

Q. *Just all lumped together?*

A. Yes. I mean such services as we had at these conferences, which took those sums, we discussed the financial affairs, and advised them what they should do.

Q. And for that advice, a portion of the fee charged by the Byllesby Engineering and Management Company was included in the charges made by the Standard Gas and Electric?

A. For assisting in the financing, yes. For assisting in the development of the financial plans I think would be a better way to state it."

Henry C. Cummins, at one time Deep Rock's President and at all times connected with the Standard and the Byllesby interests, also confuses the identity of the officers of the Engineering and Management Corporation with those of the Standard when it comes to giving advice to the Deep Rock in regard to its administrative and financial affairs. Cummins testified (Tr. 139-141):

Q."How frequently, if at all, were there conferences held

between the officers of Shaffer Oil and Refining C
pany and those of *Standard Gas and Electric Compa*

A. I would say that there were general conference
least once or twice a week. Aside from that, there
hardly a day on which I was not in touch with s
member, particularly with the *fiscal end of the Stand*
Gas and Electric Company.

Q. Who, particularly, did you confer with generally in
gard to the money affairs, fiscal affairs?

A. Mr. O'Brien mostly, at that time.

Q. And what was the nature of your conferences?

A. Well, we needed money very badly. We were on a
riod where we had to expand, the company had to c
mortgages, its earnings were not good, it had to
ahead, it couldn't stand still. To go ahead meant mo

Q. What arrangements did the company make to get m
ey, from what source did it get it?

A. *Entirely from the Standard Gas and Electric Comp*
practically entirely.

Q. State whether or not you had any such thing as a bu
or an allowance for monthly expenditures for the
quisition of property or the development of prope
during that period.

A. That was insisted on almost immediately, if my mem
serves me, after I succeeded Mr. Moore. As an exam
we had secured an appropriation, I think this was sh
ly before I came in, we had secured an appropriatio
$50,000 a month for leasing purposes.

Q. From what source had you secured that appropriat

A. Of course, it was voted by the directors of the
pany; the money actually was supplied by the Stand
Gas and Electric Company.

Q. Was that amount of money expended under your d
tion in extending the production of the company?

A. Yes, sir, leases and production."

Francisco also failed to make it clear whether these
ferences in regard to administrative and financial mat

were with individuals acting as Standard's officers and directors, or for the Management Corporation. Francisco testified (Tr. 164-165, 166-167):

Q. "Now, Mr. Francisco, when you came to these conferences or meetings in Chicago and produced the forecasts of business, I wish you would tell what was ordinarily done in a meeting with regard to the business of the company for the following year.

A. Well, we came about once a month, so that this picture was *changed each month,* but there was generally an allotment made of twenty-five or fifty thousand a month for *acquisition of leases,* and different amounts up to perhaps a million and a half for the drilling of wells. The actual purchases of those leases and the drilling of those wells was handled under Mr. Riddle's jurisdiction in Tulsa. * * *

Q. Did Mr. O'Brien and Mr. Graf go over with the men present the propriety of expenditures, and the necessity and purposes of expenditures from an operating standpoint?

A. Yes, sir.

Q. Did they discuss the general conditions of the oil business, and business conditions generally with you?

A. Yes, sir.

Q. Each month, as you say, when you came back, that picture would change by reason of the fact that it did not work out just as had been anticipated?

A. Yes, sir.

Q. And when you fell short, you would ask the Standard for money.

A. That is correct.

Q. State whether or not they always advanced the money that you asked.

A. Yes, sir, they did."

When asked in regard to the Deep Rock's budget, Francisco stated (Tr. 184) that the "figures were prepared by the operating heads. Mr. Moody for the refinery, Mr. Riddle for

the producing and pipe line department, Mr. Majewski for the marketing." Francisco further testified (Tr. 184-185):

Q. "Now, to whom were those budgets submitted?

A. They were submitted in our monthly meetings to Mr. O'Brien and Mr. Graf.

Q. Who were Mr. O'Brien and Mr. Graf representing? That is, were they representing the Standard Gas and Electric when those budgets were submitted to them?

A. That I could not answer.

Q. They were submitted to them for two purposes, weren't they, to obtain their approval of the policies outlined?

A. Yes, sir.

Q. And also to ascertain whether or not the Standard Gas and Electric would finance your needs?

A. Yes, sir. Mr. O'Brien was president of the Deep Rock.

Q. Both corporations.

A. Yes, sir.

Q. And Mr. Graf was vice-president and a member of the board of directors of the Standard?

A. Yes, sir.

Q. He did not hold any office with the Shaffer Oil and Refining Company?

A. I think he did at one time, but I don't think he held an office most of the time. He was a director, however.

Q. Of the Deep Rock?

A. Yes, sir."

B. W. Lynch, in a strained but nevertheless heroic effort to find some basis to support the Management Corporation's supervision fees, testified as follows (Tr. 274-282, 301-302):

Q. "During the years from the purchase of that property in 1919 until after the election of Mr. Gray and the removal of the offices of Shaffer Oil and Refining Company to Tulsa, what was your custom with regard to conferences with the officers of that company, in regard to their business problems?

About once a month when Mr. Gray and his officers which included Mr. Francisco, came to Chicago for their operating conferences with the *operating officials of Byllesby Engineering and Management Corporation,* immediately after such meetings Mr. Gray and Mr. Francisco would come into my office. The three of us would sit down and go over *everything of moment* affecting my part of the work, and then Mr. Francisco would usually stay that afternoon, sometimes the next day, going into the details, checking upon his field work, because his being at Tulsa *made no difference to us on our contract.* We had to keep in touch with him as directly as if he were here in Chicago, as previous to that.

Well, before the removal of the offices to Tulsa, what was your custom in regard to conferences with the officers in charge of Shaffer Oil and Refining Company?

Well, my contact at that time would be again what I would term *daily* conferences. That would not necessarily mean that I would go over there every day, but I would go over there enough times that I would know what was going on daily.

Mr. Lynch, had you had any experience in the oil business before 1919?

I had a lot of personal experience.

Where had you been engaged in the oil business before that time?

Well, in 1916 H. M. Byllesby & Company had an investment in an oil property in and around Cleveland, Oklahoma, that was entirely productive. I was down on that property, even out at the wells when they were brought in, I organized the accounting and general administrative offices. That was similarly followed by ventures in the states of New Mexico and Kansas by H. M. Byllesby & Company.

And were those ventures still in operation at the time of the purchase of this Shaffer property in 1919?

I think not. The only part of it would be some undeveloped acreage that we were holding. That, of course, I had not covered in my personal experiences in oil, be-

cause I have drilled an awful lot of wells, good and bad. I am still in the oil business, as far as that is concerned, personally.

Q. You remember the circumstance of the employment of Mr. Gray, do you?

A. Yes.

Q. Why was he employed?

A. Well, it was a matter of organization. I have mentioned that when we acquired the oil property in 1919, I looked around for a man to handle the financial and *accounting, namely, Mr. Francisco.* That same principle obtained with reference to the management at that time, it was absolutely essential to give the management of Shaffer Oil and Refining Company equally *expert services* as we had *our public utility properties,* for the reason that Standard Gas and Electric Company had a large investment in this property, it *would be regarded as a part of the system,* that is, *the Standard system,* and its successful operation would be reflected in the Standard Gas system, and it was absolutely necessary for us to provide full and complete expert management. In fact, that was one of the conditions surrounding the financing of the property, that we would have oil experts therein.

Q. How did you happen to employ Mr. Gray, do you remember?

A. Well, I personally, of course, did not employ Mr. Gray. *Our organization,* looking around, consisdered many, many men at the time, and from the applications and conferences and recommendations, Mr. Gray was selected as the man.

Q. Do you know by whom he was recommended?

A. I am not sure of that. You mean the individual who recommended him?

Q. Yes, sir.

A. No, I don't remember that now.

Q. You knew that he had a reputation as an *expert* in the oil business, did you?

Oh, yes. He had a very enviable record.

Now, you have referred to Byllesby Engineering and Management Corporation as one of the institutions with which you were connected. I wish you would state what was the general nature of the service rendered by *Byllesby Engineering and Management Corporation* to Shaffer Oil and Refining Company for which service compensation was charged and as claimed in this account paid for Shaffer by Standard.

Our organization, that is, Byllesby Engineering and Management Corporation, is equipped to give expert *advice on operating, administrative and financial affairs.* This organization is equipped to render this service to public utility corporations, and to a large measure even an oil organization. However, I would say in an oil organization that part of our expert services which would be rendered to utilities similar to the operation of a power house, which I would compare to the operation of a refinery, would not be as embracive in our services. However, with that single exception, the *experience* of the men in the Byllesby Engineering and Management Corporation would be complete. That is, first, not necessarily in their order, financial contacts, which also brings sales contacts for the refined products. *Supervisory service with respect to any decision* which would go into the necessary detail of *why money should be invested.* That is, we would go into it through our own organization, if they were to spend the money on these budgets, as I have heard some of the officers testify here in the past few days, that estimate would be checked up thoroughly in our own organization, we would even check with outsiders in regard to it.

I personally, when the budget would come up for approval, would take in the idea of what Shaffer Oil and Refining Company was doing at the time into the financial institutions in New York and Chicago, and ask the men in affairs where they were lending money, what others were doing, how they were viewing it, so that when the investment was made for the company,

and usually provided by Standard Gas and Electric Company, we would have those complete details.

Q. This service was a part of the general service rendered. Now, do you know whether or not any actual service, such as payment of dividends, which was testified to by one of the witnesses here the other day, was rendered by Byllesby Engineering and Management Corporation?

A. The fiscal services rendered to the Shaffer Oil and Refining Company were as complete as any such fiscal services, as they are known, that could be rendered by any organization embracing the keeping of stock records, dividend payments, *et cetera*. I think that particular department is recognized as sort of a national institution. In fact, I don't know whether it was brought out in the testimony of anyone with regard to the fiscal department of Byllesby Engineering and Management Corporation, but we have given permission time and again for institutions larger than ours, to permit our system to be used. That statement goes a little bit further. Also I would say that for the accounting department.

Q. Now, during the time that this service was being rendered, from the purchase of the property until the receivership in 1933, state whether or not Byllesby Engineering and Management Corporation held itself in constant readiness to render any service of that nature within its power which was called for by Shaffer.

A. The entire services of the Byllesby Engineering and Management Corporation, not only in its own offices, but even extending to others which it could command, were available at all times. It was almost like buying an automobile, you say 'why do you need a couple of spare tires?' Well, when they needed them, they came in very handy. To put a value on a professional service at the time it is rendered *is almost impossible*, because the constant touch with that property, to be ready to serve them in that capacity, is not possible to record.

Q. The account sued on in this case shows certain charges

made by Standard against Shaffer for money paid to Byllesby Engineering and Management Corporation for these services about which you have testified. State, if you know, how those services were arrived at?

You mean the fee for such services?

Yes, sir, how the charge for those services was arrived at.

Well, I remember very well when John Gray came in as manager of the properties, we discussed the supervisory services of the Byllesby Engineering and Management Corporation. *I had that particularly in mind,* so that everything would work smoothly at the properties, because in one branch alone, the financial and accounting, we would contact directly with Mr. Francisco, so that he, in turn, would take it up directly with Mr. Gray, and we would not be obliged to bother Mr. Gray in all these details. Gray and I at that time figured that about a $200,000 a year fee would be about the proper charge, to which *Mr. Gray readily agreed.*

Before the close of the year, I would usually get in contact with Francisco, and ask him to take it up with Mr. Gray in Tulsa, to find out the nature of that charge for the year. Some years it would be found that the earnings would be small, and I distinctly recall John Gray several times saying, *'Well, now, I know these services are worth two hundred thousand, but you have got to cut it down to a hundred thousand this year.'* The reason we would go into that so thoroughly, and why I can remember it, is that John Gray and the other officers at Tulsa were, in effect, stockholders, because they were participating in a profit sharing plan, and a charge of this kind would be something that John Gray would pass on, as any other persons, whether it would be for crude oil, pipe, or other things. And it was thoroughly understood, in fact, it *was the happiest* arrangement that I can recall, and the pleasure of Gray and other officials down there with such services was always evident.

On that basis the money was actually paid by Standard

to Byllesby Engineering and Management Corporation, and charged to Shaffer.

A. Well, it was *billed as a fee.* And how it was paid—I don't know whether it was charged to the account.

Q. You don't know whether it was actually paid by Shaffer or not?

A. I imagine it went to the general account, so far as could be identified, yes. • • •

Q. Now, going back to the Byllesby Engineering and Management services, state whether or not that company stood ready to furnish men to fill vacancies, or to perform certain services for Deep Rock, at all times.

A. One of the objectives of the services of the Byllesby Engineering and Management Corporation is to have men in the employ of the Byllesby Engineering and Management Corporation that could, at a moment's notice, fill any executive capacity of the Deep Rock Oil and Refining Company. In that respect, we would take for instance, Mr. Francisco, if anything happened to Mr. Francisco, within twenty-four hours we could have a man available as *fully conversant* with the affairs of the Deep Rock Oil and Refining Company on hand at Tulsa to fill his position. In fact, we could send two men, if necessary, to do it. That applied to the accounting department in every respect, bookkeepers, there was a standardization of accounting to such an extent that the Chicago office of the Byllesby Engineering and Management Corporation could supply those men at all times. The familiarity of Mr. O'Brien and Mr. Graf, particularly, with respect to the executive, would apply the same way."

Lynch also testified (Tr. 314) that the discussion preceding the acquisition of the Bradstreet properties was with "the operating officials of the Deep Rock, or the operating officials of the Byllesby Engineering and Management Corporation."

Mr. O'Brien has been connected with the Byllesby interests since the Standard's organization in 1910, and has

been President of the Management Corporation, Standard, and Deep Rock since Byllesby's death in the spring of 1924. He testified that the Management Corporation had a large number of men trained technically in every department. He testified (Tr. 7):

> "Trained engineers, men who would come up from the properties, in the management of the properties, who knew what to do and how to do it, and how to advise the ablest men we could get, in the insurance line, we would save them great sums of money. *Publicity men of the highest class* and *rate experts* who were secured from commissions where they had a large experience, I mean utility commissions. In general, that is the type of men we have throughout the entire organization. They are experts in their line in every department we have to deal with."

Mr. O'Brien further testified (Tr. 13-14):

Q. "During the time that the offices were maintained here, and during your presidency, state whether or not you were called into conferences with the parties in active charge of the Shaffer Oil & Refining Company in regard to its actions or its policies?

A. I was, very frequently.

Q. State whether or not that was continuous after the removal of the offices to Tulsa?

A. *I think more so than ever.*

Q. How frequently were there conferences held in Chicago at the offices of the company here or those in Tulsa?

A. That is impossible to tell. We kept no record of it.

Q. Was it frequent or otherwise

A. Very frequent. In addition to that, Mr. Gray, Mr. Moody, Mr. Francisco, Mr. Riddle, Mr. Huey and Mr. Dade would come to Chicago very frequently and put their matters before us.

Q. During your time as president of the Shaffer Oil and Refining Company, state whether or not you ever received any salary from that company?

A. Never received any salary of any kind, or any compensation of any kind.

Q. Who paid you the salary which you received as president at that time?

A. The Byllesby Engineering & Management Company.

Q. Do you know whether that company paid the salaries of other officers of the Shaffer Oil & Refining Company?

A. I cannot say at the moment. That is a matter of record and can be proven.

(NOTE: No proof that Engineering and Management Corporation paid any Deep Rock's officers' salaries.)

Q. Did you at that time or about the organization of this company know Mr. Majewski, now one of the officers under the receivers in this case?

A. Yes.

Q. When did you become acquainted with him?

A. Immediately after we bought the Shaffer property.

Q. Was he connected with Mr. Shaffer at the purchase of this property?

A. He was.

Q. In what capacity?

A. I don't remember exactly, but it was in connection with the distribution department.

Q. State whether or not his connection has been continuous since that time?

A. It has been continuous since that time.

Q. In what particular branch is he functioning?

A. In the distribution of refined products.

Q. Where does Mr. Majewski maintain his office?

A. In Chicago, in the Ashland block."

He further testified (Tr. 17-19):

"The men, that includes Mr. Gray leading them, Mr. Riddle, Mr. Majewski, Mr. Moody, Mr. Francisco, and sometimes Mr. Dade and Mr. Huey, would come

to Chicago with *their plans,* which involved large *expenditures of money usually.* I will say now that no expenditures were made that were not recommended by them. And further I want to say that no important moneys were spent or items *approved without the approval of this Chicago office,* and that means myself and Mr. Graf principally, as we were the two men that sat in with them on all these recommendations which they would make. Very frequently, in addition to the time Mr. Graf and I spent with them, we could not approve what they asked, and possibly days would be spent by the *rest of our organization* going over the proposition to see whether or not we would approve it, like Mr. Lynch, Mr. Morrison, Mr. Briggs, Mr. Braheney, Mr. Cummins, a whole horde of men called in to consult on this matter, a lot of time was spent with the matters pertaining to the Shaffer Oil & Refining Company by members of the staff in the Chicago office.

Q. Did Mr. Majewski have conferences with you also?

A. Yes. If I did not mention his name in that list, I meant to. He was at practically every one of the conferences.

Q. What were largely the questions which Mr. Majewski brought before you for determination?

A. They were questions such as, for instance, whether he should buy additional stations for distribution, and buy additional property or lease property. Further than that, we were in a continuous turmoil here, I do not mean our company particularly because we played along with them pretty well. Of course, the Standard Oil of Indiana was the company that controlled prices throughout this territory, and Mr. Majewski was continually coming to me or someone in the office, consulting with us whether or not he should fight them, play along with them, or what he should do with them. And that applies to other concerns as well that were in the oil business. And while he was in our office he would come over very frequently to consult on those matters.

Q. Then for all of that service so rendered you say no charge was made other than the *management charge, which is included in the account?*

A. That is correct.

Q. State whether or not there was any *financing* for the Shaffer Oil & Refining Company necessary from the date of its purchase up to the time its operations terminated?

A. It was *almost a continuous* process, as a matter of fact, furnishing money for it. I would a good deal rather Mr. Lynch would answer that question, who is far more familiar with it.

Q. And by what organization was that service rendered?

A. A large part was rendered by Standard Gas & Electric Company, and some of it by H. M. Byllesby & Company.

Q. Do you know whether or not money was actually advanced at any time to the company by the Standard Gas & Electric Company?

A. Yes, I know that fairly well, *tremendous sums,* in very large amounts.

Q. Do you recall the purchase of the so-called *Bradstreet* property?

A. Yes, I recall the purchase of that. That was very highly recommended by Mr. Riddle that *we purchase* the property. Mr. Gray looked over it, and the other parties, but it was particularly Mr. Riddle that recommended the purchase of that property."

The absurdity of the supervision claim is immediately exposed when one contemplates Mr. O'Brien and his associates, acting for the Deep Rock, consulting with themselves as officers of the Management Corporation with a view to obtaining advice from themselves, as officers of the Management Corporation, as to what they should do as officers and directors of the Deep Rock, and when they arrived at the conclusion that they should borrow money from the Standard, if they could obtain it, consult themselves, as officers of the Standard, as to whether or not Standard should loan the money to the Deep Rock. We deny that a question asked

for the purpose of exposing this absurdity was foolish because the situation was foolish.

Mr. O'Brien testified (R. Vol. 2, p. 4) that in 1919 when they acquired the Shaffer properties *"we knew nothing about the oil business at that time."* He further testified that he had no knowledge as to *"how the amount of charges that were made for these managerial fees were arrived at."* He also testified that he did not know who would be able to state the basis upon which the managerial fees were arrived at. (R. Vol. 2, p. 7) He further testified that he had never been a civil engineer or a utilities engineer, but that he "came up from the financial side," saying "I started in as treasurer and general auditor with the Standard Gas and Electric Company and with Byllesby Company." (R. Vol. 2, p. 14) He further testified that up until 1919 he had never had any experience in operating oil properties, but since that date "I have had a lot of it in the matters that have been brought before me." He admits he never conducted the drilling of an oil well or the exploration of lands for oil, and that he has never had any experience along that line. With respect to the acquisition of oil properties, such as buying leases on non-producing properties and producing leases, he stated, "I have had a great deal of experience through others. Not directly myself, no, but through the recommendation of others, and hearing their reasons for wanting to purchase leases, and so on." He further testified that he had never had any experience in operating an oil refinery. (R. Vol. 2, p. 14) When asked what officer or director of the Engineering and Management Corporation had any experience in operating an oil refinery, he named Mr. H. C. Cummins, who operated the Deep Rock's Cushing refinery, but stated that he did not know of Mr. Cummins having any experience in operating a refinery before the Deep Rock was organized. In answer to the question, "After the

organization of the Shaffer Company, did Mr. Cummins go to Cushing and operate the refinery?" he said, "No, he was down there very frequently, though." He said he didn't know of Mr. Cummins having any technical education along the lines of operating a refinery, and when asked if Mr. Cummins had "any experience in operating oil leases, developing oil leases and lands for oil purposes," he answered, "not until he became acquainted with Shaffer." By this, he states he means that Mr. Cummins, so far as he knows, had no experience before becoming connected with the Deep Rock.

Q. "Had he (meaning Cummins) had any experience prior to that time?

A. Any experience in what?

Q. In operating refineries.

A. No.

Q. And no experience prior to that time in the operation and development of oil properties.

A. No.

Q. All the experience he has had on that has been since his connection with the Shaffer Oil and Refining Company.

A. Yes.

Q. All he knows about it is what he learned after the Shaffer Oil and Refining Company was organized, is that right?

A. Yes." (R. Vol. 2, p. 15)

He says he does not think H. M. Byllesby had any experience in operating an oil refinery or constructing a cracking plant, and admits that he had had no experience and hasn't had any experience up to date in the construction of cracking plants and the operation of the Dubbs stills and things of that kind. (Tr. 57) When asked to name the officer, director or employee of the Byllesby Engineering and Management Corporation having experience in the construction of Dubbs stills and cracking plants, he said, "Well, Mr.

Osthoff had enough experience as an engineer to build the first Dubbs plant" and that Mr. Osthoff had a number of assistants in his own organization, and he furthermore said that he doesn't think Mr. Osthoff had ever constructed a Dubbs still or cracking plant prior to the one that was constructed for the Deep Rock Oil and Refining Company, but that Mr. Osthoff must have had enough knowledge to build that correctly as it worked when he got through with it.

(NOTE: As a matter of fact, as pointed out in the record and shown by the contract with the Universal and the testimony of Mr. Moody, Grenacher was the engineer who advised with the Deep Rock in regard to the construction of the Dubbs stills. Grenacher advised with the Deep Rock's own engineers. However, the engineering services are wholly immaterial to this point because they are not a part of the $1,219,034.83 supervision and management fees. Exhibit "C" (R. Vol. 3, p. 27) to Knourek's answer to the 27th interrogatory shows a bill dated December 31, 1922, for $60,000.00 "engineering fee based on approved special budget covering cracking process and accessories, for which plans and specifications have been prepared and large part of work completed." This $60,000.00 charge is a part of the "Sundry Charges" in the sum of $230,463.16, set forth at item No. 20 in the list of charges in Exhibit "A" to Standard's claim, being entitled "Byllesby Engineering and Management Corporation *Sundry Charges.*" The $60,000.00 engineering charge was for services on the Dubbs cracking stills "based on approved special budget covering cracking process and accessories" (pretty high) and was clearly for Grenacher's work. Knourek, in his answer to the 104th interrogatory says:

> "Mr. Grenacher's position with Byllesby Engineering and Management Corporation was that of Engineer and the charges of Byllesby Engineering & Management Corporation to Deep Rock Oil Corporation, appearing in Exhibit 'C' given in re-

sponse to question #27, for his services and ex
penses were for engineering work principally i
connection with the construction of the crackin
plant. The annual salary paid to Mr. Grenacher b
Byllesby Engineering & Management Corporatio
in 1922 and 1923 was $6,300.00 and $9,006.57, r
spectively."

In "Sundry Charges" appear items for Grenacher
services and traveling expenses totaling $2,365.6
which should be disallowed as the $60,000.00 ought
cover that.

The supervision fee does not include engineeri
services, as shown by the testimony of B. F. Brahen
*There is not the slightest evidence showing or tendi
to show that any officer or employee of the Engineeri
and Management Corporation rendered any techni
service to the Deep Rock by way of advice, supervis
or management. NONE OF THEM WERE COMP
TENT TO DO SO.* Experts and men of long experie
in the construction and operation of refineries a
cracking plants, the drilling of oil and gas wells,
production of oil, the acquisition of likely looking lea
and the marketing of the refined products, were e
ployed for the Deep Rock. The Deep Rock paid th
salaries and *one wonders* "why Deep Rock emplo
these experts if Engineering and Management Cor
ration was to do the work."

W. E. Moody is now and has been superintend
of the Cushing Refinery since 1920, and in fact was w
the refinery since its purchase from Mr. Shaffer in 1
He is a highly qualified refinery and cracking plant
erator of 26 or 27 years' experience. Mr. O'B
thinks Mr. Moody was with the refinery at the time
property was purchased from Shaffer. In fact Mo
was with the Consumers Refinery since August, 1
which was the refinery acquired by Shaffer. (Tr.
Majewski testified that Moody had nad experienc
the refining business at Independence, Kansas,
George Moore.

George Moore, an experienced oil man and refinery operator, was President of Deep Rock and in charge of its refinery and business after Mr. Shaffer resigned up until June, 1922, when he was succeeded by Henry C. Cummins. (Tr. 135) H. C. Cummins was asked this question (Tr. 147):

Q. "Mr. Moore was an old experienced oil operator, wasn't he?

A. Yes, sir.

Q. He knew a good deal more about the game than you did, didn't he?

A. Yes, sir.

Q. You succeeded him as president of the Shaffer Oil and Refining Company? That is correct?

A. That's right."

Majewski testified (Tr. 90) that Mr. Moore was President of the Consumers Refining Company, and (Tr. 91) he was an experienced refinery operator, had had experience at Independence, Kansas, and prior to that time he was a pipe liner. Majewski also testified (Tr. 79) that Mr. Moore hired him when he first went with the Consumers Refining Company; that Mr. Moore was general manager and president. When asked if he knew what experience Moore had had in the oil business Majewski said, "He was vice-president of the Petroleum Production Company and the Standard Asphalt and Refining Company, with plants at Independence, Kansas."

Evidently Cummins was not sufficiently experienced in the refining and oil business to successfully manage the Deep Rock, and therefore he was succeeded by John Gray, who took over direct operation in October, 1924. (Tr. 135) In fact the officers, directors and employees of the Engineering and Management Corporation and the Standard had so little experience outside of the public utility business that they found it necessary to hire John Gray, an experienced oil man and refinery operator, to make a survey of the Deep Rock properties. (Tr. 91)

Majewski testified (Tr. 91-92) that Gray was an experienced refinery operator "of many years' standing" and was "regarded by the profession as an expert in that line"; that Gray had scientific knowledge of how to construct refineries and operate them, and had scientific knowledge of how to construct and operate cracking plants, and that as soon as Gray made his report which the Standard had employed him to make, he was then employed by the Standard to go with the Deep Rock. As shown by Standard's Exhibit 8 (Tr. 115) Gray was employed in the latter part of March or the first of April, 1924, to make this survey for a fee of $15,000.00, which Standard paid. (Tr. 559)

L. B. Riddle, was employed in 1922 during George Moore's administration. (Tr. 54) Riddle, now 45 years old, began working in the oil fields at the age of 16, took a mining and engineering course at school, and when employed by Deep Rock was a man of long experience in the art of drilling wells and producing oil and buying leases. (Tr. 698, etc.)

Neither the Management Corporation nor the Standard paid the salaries of Cummins, Moore, Moody, Riddle and Gray. Deep Rock paid them.

Mr. O'Brien testified that shortly after he became President "we employed Mr. John L. Gray. We first hired Mr. Gray to go down and make a report on the property, tell us what we should do. He made a very good report and we employed him along in July of 1924." (Tr. 12)

Gray's salary of $36,000.00 per annum was paid by the Deep Rock, as well as Riddle's salary of $12,000.00 per annum in 1922, 1923 and 1924, and $13,500.00 in 1925, and $18,000.00 per annum from 1926 to 1930, inclusive, and $16,950.00 in 1931 and $16,200.00 in 1932 and 1933. (See Kerr's answers to the 16th and 17th interrogatories.) This is conclusive evidence that the Management Corporation did not have any officer or employee qualified to manage an oil producing company or operate a refinery or cracking plant, and realizing

their utter incompetency along these lines, Gray and Riddle, experts, were hired at high salaries, neither of which were paid by the Engineering and Management Corporation or by the Standard, but paid by the Deep Rock.

It appears from the question at the bottom of page 461 of the transcript that Standard's counsel admits that the Engineering and Management Corporation charged Deep Rock with approximately $67,000 for services of Mr. Braheney and Mr. Lynch, which exceeds our calculation made from Exhibit "C" to Knourek's answer to the 27th interrogatory. The Engineering and Management Corporation charged to the Deep Rock a part of Lynch's monthly salary as one of the Engineering and Management Corporation's officers. These charges were at the rate of $416.66 or $416.67 per month up to and including December, 1924, and then commencing with January, 1925, Deep Rock was charged $416.66 per month for Braheney's services. These charges were the pro rata part of the salaries of Lynch and Braheney as officers of the Engineering and Management Corporation. (Tr. 407, 408, 411, 444, 445) Not only that, but the Management Corporation charged Deep Rock with Grenacher's services and traveling expenses in the sum of $2,365.65 (See Knourek's answer to the 27th interrogatory, and Tr., pp. 93, 95, 606 and 607.) The Management Corporation also charged traveling expenses of H. M. Byllesby, Gordon, and other of its officers, all of which is shown by Exhibit "C" to Knourerk's answer to the 27th interrogatory. These charges constitute no part of the $1,219,034.83 supervision fee. It seems that the Standard advanced money to the Management Corporation each month. (Tr. 543) The Management Corporation paid Deep Rock's directors fees in the total sum of $3,140.00, as shown by Exhibit "C" to Knourek's answer to the 27th interrogatory. (R. Vol. 3, p. 27) These director fees were for the Deep Rock's directors, as testified by Knourek. (Tr. 604) Neither of these items, directors' fees, etc., traveling expenses, etc., constitute any part of the $1,219,034.83, supervision fees.)

(c) Discount on Quantity Purchases.

In support of the supervision fee of $1,219,034.83 Stand ard contends that the Deep Rock received discounts on th purchase of supplies because the Engineering and Manage ment Corporation had authority to purchase supplies for al the Standard's subsidiary corporations, and on account o the large quantity of orders discounts were obtained whic could not have been realized by Deep Rock on its individua purchases. In other words, Standard contends that the Dee Rock received discounts through the Engineering and Man agement Corporation's authority and ability to make larg purchases.

Mr. O'Brien testified (Tr. 8\ that the Engineering an Management Corporation main ained a purchasing depart ment which resulted in advantage to the Deep Rock becaus of "mass purchases."

R. J. Graf testified (Tr. 118) that A. C. Bull was "ou purchasing engineer for the last ten or twelve years" an reported "to a purchasing committee, of which I am chair man." He says that the purchasing committee was com posed of the chief engineer and the chief operating vice president, and that the committee was composed of thre members, all three of whom he thinks were members of th Standard's Board of Directors. (Tr. 119)

A. C. Bull testified (Tr. 230-235):

Q. "And what character of supplies are purchased throug your office for those companies known as the Byllesb Company?

A. Well, the various types of apparatus and commodities that are required directly in *construction work* that is being supervised here in Chicago by the engineering de partment are naturally all purchased here in Chicago, so that we will have close connection with the engineers. Also such commodities as poles, wire, pipe, the prices

of which are usually determined by the quantities purchased, those are also purchased here in Chicago. The properties send their requirements in to us, and we make the purchases for them.

In addition to that, there are innumerable *commodities* where the price of the commodity is governed entirely by the *volume of the purchasing.* Usually those are covered by a contract, which might be referred to roughly as *a quantity discount contract.* The manufacturer has a certain basing. Then, depending on the amount that you purchase from him during the year, he grants you an additional discount. Whenever conditions like that occur, we negotiate and *draw up a contract* in the name of the Byllesby Engineering and Management Corporation, and list all of the various affiliated properties (companies) so that they may enjoy the benefits of that contract, and purchase under the same. In practically every case of that kind the properties place their orders *direct* with the manufacturer, the purchases are reported to us at the end of the year, and the discount to be earned is then determined and paid over. Now, of course, in some contracts our purchasing volume is so far in excess of the maximum quantity necessary to earn the maximum discount that we are allowed that discount directly on the invoices.

Q. When a discount, however, is not allowed on the invoice, but awaits the result of the year, say, for which your contract runs, then do the selling companies refund that discount, or pay it in money?

A. In some cases it is paid in money, and in some cases, in large accounts that continue every year, it comes through in the form of a credit memorandum.

Q. Whether in money or credit, what becomes of the proportion which is allocable to the affiliated companies?

A. Those credits and payments first come into the purchasing department, where we check the record, and then I personally turn them over to Mr. Braheney, of the accounting department.

Q. And who credits the various companies?

A. He checks with the local properties, to make sure record is correct, and then credits them with it.

Q. What kind of commodities are purchased under th quantity discount contracts?

A. Well, there are all kinds of electrical apparatus, elec lamp poles, automobiles, office supplies, packing should say there are some forty or fifty contracts that type in existence.

Q. When did you become head of the purchasing dep ment?

A. 1925.

Q. And previous to that time had you been connected w the purchasing department?

A. Yes, sir.

Q. Now, from the years 1922 to 1933, inclusive, st whether or not *your department placed any orders* Shaffer Oil and Refining Company.

A. Yes, sir, they did.

Q. Can you tell approximately how many orders w placed, and the amount of purchases made for that co pany through your office?

A. You mean for the total period to date?

Q. Yes, sir, for the full period.

Mr. Ramsey: 1922 down to date?

Mr. Gibson: 1922 to 1933.

A. The orders placed direct from our records amount $1,119,713.

Q. How many orders was that?

A. *360 orders.* Now, *those are the orders,* I might a that were placed *directly* by the *Chicago purchasing* partment. That does not include the orders that we placed against our general contracts.

Q. Have you any method of determining how many orde were placed for the Shaffer Oil and Refining Compa *against your general contracts?*

A. Well, I have no information as to the number of orde but we recently completed a study of the purchas

made by the *various members against those contracts for the years 1927 to '31, inclusive.* In checking the reports that we would receive from the manufacturers covering the earnings on these contracts, we find that the oil company made total purchases amounting to *$173,374* against those contracts.

Q. And what amount was saved to the Shaffer Company by reason of the quantity discount *contracts* through which those commodities were purchased?

A. The total saving accruing to the Shaffer Company amounted to *$11,669,* or *seven per cent* of the net purchase price.

Q. That was for those four years?

A. Yes, *five years.* Now, in establishing that figure, we went through these contracts and established first what quantity discount, if any, would have been earned by the Oil Company on account of the volume that was purchased by them. We then compared that with the actual discount that was earned by the total purchases of *all the Byllesby* property, and the resultant difference is this saving of $11,669.

Q. Now, assuming that the same relative rate of purchase applied for the entire period from 1922 to '33, inclusive, what is your estimate of the total of saving to Shaffer Oil and Refining Company by reason of its purchases under the contracts of the Byllesby Engineering and Management Corporation?

A. You mean under the contracts alone?

Q. Yes, sir.

A. The purchases under the contracts alone I estimate would probably average $30,000 a year, or roughly $350,000 for the total period.

Q. And under the seven per cent saving by reason of quantity contract, quantity purchases, you estimate how much?

A. It would be roughly around $25,000.

Q. Now, you had contracts with automobile companies also, did you?

A. Yes, sir."

Bull also spends a page or two on automobile discou
but he says (Tr. 236) Deep Rock "could not have qual
for that type of contract, as their annual purchases w
specifically have to have been in excess of $20,000 a y
and in none of these five years did they approach $20
in total purchases." That being true, we see no necessit
go into the automobile discounts.

Mr. Bull testified that during the period prior to Fe
ary, 1933, his purchasing department "consisted of the p
chasing engineer, myself, four assistant buyers, and a cl
cal force. At the maximum we had eighteen. Right now
are down to ten." (Tr. 238) This being true, it is rema
able that the witness, or some other witness, is unable
definitely determine and put in the record the exact amo
of purchases made through the Engineering and Mana
ment Corporation, directly or indirectly, by the Deep Ro
and the amount of discount in dollars and cents the De
Rock obtained on all the purchases as a total. The best
can make out of Bull's testimony is this: That from t
year 1922 to 1933, inclusive, the Engineering and Mana
ment Corporation placed purchase orders for the Deep Ro
in the total amount of $1,119,713.00 (Tr. 233); that the
were 360 of these orders; that they were placed direc
by the Chicago purchasing department; that these orde
did not include orders that were placed direct by the De
Rock; that he has no information as to the number of orde
Deep Rock directly made against the Engineering and Ma
agement Corporation's general discount under general co
tracts; that he has recently made a study of the purchas
"made by the various members (meaning the Standard
subsidiary corporations) against those contracts for th
years 1927 to 1931, inclusive"; that in checking the repor
received from manufacturers "covering the earnings o
these contracts, we find that the oil company made tot

purchases amounting to $173,374" during that five-year period—1927 to 1931, inclusive; that in these five years of direct purchasing under general contracts the Deep Rock realized a discount of $11,669; that assuming the same relative rate of direct purchases for the whole period from 1922 to 1933, inclusive, witness estimates that it "would probably average $30,000 a year, or roughly $350,000 for the total period," resulting in a savings on discount to the Deep Rock of approximately $25,000.00. In fact at seven per cent the discount on the whole period would be $24,500.00, that is, seven per cent of $350,000.00. Witness talks about "quantity discount contracts" depending "on the amount that you purchase" from the manufacturer "during the year"; talks about maximum and minimum discount, but does not state the amount of discount received on the purchase of $1,119,713.00. A discount of seven per cent on $1,119,713.00 would be only $78,379.91. Add to that the $24,500.00 discount on the $350,000.00 estimated purchases over the entire period and we would have a total discount of only $102,879.91. The Engineering and Management Corporation is certainly not entitled to the benefit of all that discount, but allowing it one-fourth of the discount it should receive only $25,719.98.

R. J. Graf testified (Tr. 122) that the principal thing purchased by the Engineering and Management Corporation for the Deep Rock was pipe, and he imagines it also purchased "other things, like automobiles, and tires, and things like that." He says (Tr. 123), "We could give you a memorandum of those. But principally I think it was pipe that entered into the operation of the oil company."

(NOTE: No memorandum of the exact purchases has been furnished.)

Graf also testified (Tr. 123) that these purchases were "usually done through a consultation between the purchas-

ing agent or the purchasing officer of the Deep Rock Shaffer Company with our Mr. Bull''; that the Deep R "had some particular officer that looked after the purch ing of the material and supplies which it needed''; he not definitely state the amount, but says, "I can get those figures from our purchasing agent's file,'' but t have never been furnished.

Claimant's counsel admit (Tr. 124) that there was contract covering any specified scale; merely an agreem that they would give them the benefit of all discounts t received, and charge them a reasonable fee.'' It was a admitted "that there was no written contract between Shaffer Oil and Refining Company and the Byllesby En neering and Management Corporation at any time'' cov ing "its fees or charges for any services, purchasing pi or any other material.'' (Tr. 124-125)

In Knourek's answer to the 21st interrogatory appe a number of items entitled "Wheeling Steel corporati settlement of account for materials purchased,'' and Kno rek testifies (Tr. 535) that those items were purchased " Deep Rock and other subsidiary companies of Standa and one settlement each month was made by Standard cover payment for invoices rendered against all subsi aries''; also he testifies that the Deep Rock made the pu chases from the Wheeling Steel Corporation, the tot amount of which, according to Knourek's answer to the 21 interrogatory, was $293,024.93, from which it thus appea that the Engineering and Management Corporation was n doing all the purchasing for the Deep Rock.

Recapitulation—supervision fees.

As we are not contesting the Management Corpora tion's "Sundry Charges, $230,463.16'' except as hereinafte stated, a most liberal allowance for the supervision fee would be as follows:

(1) For services of stock transfer agent (see pages 268-269 herein)	$ 8,500.00
(2) For issuing dividend checks and servicing them	17,200.00
(3) One-fourth of the amount of discount realized on mass purchases (see page 315 herein)	25,719.98
Total	$51,419.98

From the $51,419.98 should be deducted the *pro rata* part of the salaries of Lynch, Francisco and Braheney, as officers of the Management Corporation charged to Deep Rock and forming a part of the "Sundry Charges, $230,463.16." Unless this deduction is allowed, Deep Rock would be paying for "nothing." If Deep Rock is to bear a part of the salaries of the officers and employees of the Engineering and Management Corporation, then it was entitled to their services free and the *whole supervision fee should be disallowed.* But if anything is allowed for supervision fee then these salaries should be deducted from the allowance:

(1) The amount of Lynch's salary charged	$21,666.44
(2) The amount of Francisco's salary charged	1,403.06
(3) The amount of Braheney's salary charged	5,833.24
Total	$28,902.74

In the absence of some proof to the contrary, the Management Corporation's "Sundry Charges" of $230,463.16 are ample compensation for all of its services of every kind and character. Exhibit "C" (R. Vol. 3, p. 27) to Knourek's answer to the 27th interrogatory shows that it charged an engineering fee of $60,000.00 covering an approved budget for the cracking process and accessories of $600,000.00. That

was a fee of ten per cent. *There is no evidence to sh per cent was a reasonable fee.* (R. Vol. 2, bottom p. 1 140.)

The "Sundry Charges" contain items for the ex and salary of Grenacher, one of the engineers, in th of $2,365.65. The "Sundry Charges" also contain th lowing items:

(a) Lynch's traveling expenses.....$ 1,

(b) Consultation fees of Cummins, Roemer & Flynn, Standard's general counsel, in the sum of..... 37,

Standard charged Deep Rock (Knourek's answer 21st interrogatory) $15,500.00 attorney fees, and tax ices of Haskins & Sells, $53,164.10.

This does not include Cummins, Roemer & Fl monthly retainer of $500.00 for some months and $7 for other months, and other fees. That firm of lawyer ceived a fee of $750.00 for "services, consultation an vice *in re* proposed shut-in agreement" including tim "Paul Reiss on trip to Tulsa, June 15 to June 18, 19 three days. That seems like a liberal fee. Reiss' expe were all charged and formed a part of the "Su Charges" shown by Exhibit "C" to Knourek's answe the 27th interrogatory.

It seems clear that the "Sundry Charges" con compensation for all the services of the Management poration and that the "supervision fees" were utterly supported by any evidence, and that the maximum am that could possibly be allowed is the difference between $51,419.98, itemized on page 317 herein, and the $28,902 covering the salaries of Lynch, Francisco and Brahe Subtracting the $28,902.74 from the $51,419.98 leave maximum supervision fee of $22,517.24. Deducting $ 517.24 from the $1,219,034.83, supervision fee charged,

have the amount of that item of charges which *should be disallowed, in the sum of $1,196,517.59.*

It is admitted that there was no formal or written contract between the Deep Rock and the Engineering and Management Corporation for the latter's management and supervision services; also admitted that Deep Rock's board of directors did not authorize or approve any such contract.

Mr. Lynch testified (Tr. 281) that John L. Gray, who was a mere executive Vice-President of the Deep Rock, agreed that $200,000.00 a year was a reasonable supervision fee. Gray had no authority to make such a contract or ratify such a contract. He was not even Deep Rock's President or Chairman of its Board of Directors. Even if he had been President he would have had no such power to bind the Deep Rock.

—*Quaker Oil & Gas Co.* v. *Jane Oil & Gas Co.*, 63 Okl. 234;
14 C. J., p. 93, Sec. 1858.

Thus Fletcher's Cyc., Corporations., Perm. Ed., Vol. 5, section 2128, says:

> "Officers of a corporation other than the board of directors cannot bind the corporation by a promise to pay another officer a salary or other compensation unless they are expressly authorized to make such a promise."

The Engineering and Management Corporation's supervision fees are governed pretty much by the same rules governing the salaries and compensation of directors and other corporate officers.

Thus Fletcher's Cyc., Corporations, Perm. Ed., Vol. 5, section 2132, says:

> "Stockholders or directors cannot take advantage of their ownership of a controlling interest in the corporation to vote to themselves excessive salaries or to

cause excessive salaries to be voted to them by persons *under their control.* Both the stockholders and directors in fixing compensation of officers must act in good faith and reasonably. If the by-laws provide that officers shall be entitled to salaries, and require such salaries to be fixed by the board of directors, such directors must act fairly and honestly, not only towards the corporation and the stockholders, but also towards the officers who are affected."

In *Stratis* v. *Andreson,* 254 Mass. 536, 44 A. L. R. 567, the court held that directors of a corporation can not, while serving as officers, be permitted to receive as salaries more than the work they do is fairly worth. In that case Chief Justice Rugg said:

"Directors of a business corporation act in a strictly fiduciary capacity. This office is a trust. *Elliott* v. *Baker,* 194 Mass. 518, 523, 80 N. E. 450; *Cosmopolitan Trust Co.* v. *Mitchell,* 242 Mass. 95, 120, 136 N. E. 403. While there is no legal objection to their serving as officers of the corporation and receiving reasonable compensation for services rendered, they cannot be permitted under the law to receive as salaries more than the work they do is fairly worth. The fairness of such salaries is open to examination in equity for the benefit of the corporation. * * * In the case at bar the entire board received salaries in excess of the fair value of the services rendered therefor. It is immaterial in this connection whether there was actual fraud. The right of recovery for the benefit of the corporation rests upon the excessive payment to a director. *Von Arnim* v. *American Tube Works,* 188 Mass. 515, 74 N. E. 680; *Meyer* v. *Fort Hill Engraving Co.,* 249 Mass. 302, 143 N. E. 915. This conclusion is supported by the great weight of authority elsewhere. *Carr* v. *Kimball,* 153 App. Div. 825, 139 N. Y. Supp. 253, affirmed in 215 N. Y. 634, 109 N. E. 1068; *Godley* v. *Crandall & G. Co.,* 212 N. Y. 121, 130, 131, L. R. A. 1915-D, 632, 105 N. E. 818; *Decatur Mineral Land Co.* v. *Palm,* 113 Ala. 531, 59 Am.

St. Rep. 140, 21 So. 315; *Beha* v. *Martin*, 161 Ky. 838, 844, 171 S. W. 393; *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 536, 100 Atl. 645; *Green* v. *National Adv. & Amusement Co.*, 137 Minn. 65, L. R. A. 1917-E 784, 162 N. W. 1056; *Lillard* v. *Oil, Paint & Drug Co.*, 70 N. J. Eq. 197, 56 Atl. 254, 58 Atl. 188; *Booth* v. *Beattie*, 95 N. J. Eq. 776, 118 Atl. 257, 123 Atl. 925; *Sotter* v. *Coatesville Boiler Works*, 257 Pa. 411, 101 Atl. 744."

As stated in *Davis* v. *Thomas & Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717:

"It is entirely settled that, where directors of a corporation attempt to deal with themselves, their acts are the subject of judicial inquiry and supervision. Directors cannot fix the value of their own services to the corporation. Whenever they attempt to do so, and their action is challenged by a stockholder, or other interested persons, the burden is upon them to show what they have done to merit payment, and the quantity of compensation to which they are entitled is to be graded, *not by the sum voted, but by what they earn. Gardner* v. *Butler*, (30 N. J. Eq.) 702, 725; *Fougeray* v. *Cord*, (50 N. J. Eq.) 185 (24 A. 499)."

Interest on supervision fees.

It appears from Knourek's answer to the 100th interrogatory that "Practically the entire amount of the open account indebtedness (of which some of these charges were a part) due Standard from Deep Rock Oil Corporation was liquidated on or about April 30, 1926, by the receipt by Standard of 80,000 shares of Shaffer Oil and Refining Company *preferred* stock, and the proceeds of the sale of $7,500,000.00 principal amount of Shaffer Oil and Refining Company two-year 6% notes due April 15, 1928, and again liquidated at December 31, 1926, by the receipt by Standard of the $4,250,000.00 principal amount of Deep Rock's five-year 6% note." His answer to the same interrogatory discloses

that interest at 7 per cent per annum, compounded mo
ly, on the supervision fee of $99,034.83 charged Decem
31, 1921, $100,000.00 charged December 31, 1924, and $1
000.00 charged January 31, 1926, amounted to $46,48
The supervision fees charged after February 24, 1928 (
not contained in the Standard's open account balanc
$6,836,195.85—see last page of Knourek's answer to
64th interrogatory) amount to $720,000.00. The inte
charged at 7 per cent per annum, compounded monthly
the $720,000.00 supervision fees (not yet paid) amount
$165,434.74. (See Knourek's answer to the 100th interr
tory.)

Assuming that the entire service fees, as set fort
page 317 herein, of $51,419.98, should be allowed wit
any deduction of the salaries of Lynch, Francisco and
heney charged the Deep Rock, and on account of the al
impossibility of figuring interest on the $51,419.98, we
assume the court will be justified in allowing a lump
without interest, of $75,000.00—that is, $75,000.00 in
for service fees, without interest. The total interest
per cent per annum, compounded monthly, on supervi
fees, according to Knourek's answer to the 100th interr
tory, amounts to $211,924.38.

Recast of Standard's claim as to (a) rentals, (b) interest, and (c) Engineering and Management Corporation supervision fees.

(a) *In re rentals.*

If we go back of the April 12, 1928 settlement, Stan
is entitled to have restored to its debit column against
Rock the $649,999.00 Standard purported to pay Deep
for the Refining Company's stock by crediting Deep
on open account with that sum as of October 1, 1925. As

ing, without conceding, that Standard is also entitled to a reversal of the credit of $1,894,592.11 it gave Deep Rock as of October 1, 1925 (same being the cost of the cracking plant and development and additions to the Bradstreet properties), we have a total of $2,544,591.11, upon which Standard is also entitled to five per cent interest per annum from October 1, 1925, to February 28, 1933, amounting to $943,-619.18. These debits, added to Standard's present balance against Deep Rock of $9,342,642.37, give a total balance of $12,830,852.66.

(b) *In re interest.*

In answer to the 101st interrogatory Knourek testified that if the interest on the entire account had been charged at the rate of 5 per cent per annum, without compounding it, the total interest charge in Standard's claim would be $3,070,436.49, in lieu of item 15 on page 1 of Exhibit "A" to Standard's claim, entitled "Interest on open account balances, $4,819,222.07."

In answer to the 14th interrogatory Knourek testified that the credit of $922,432.83 on interest, shown by credit column in Exhibit "A" to Standard's claim, represents "the cash received from Deep Rock to apply on such charges" and that the item of $4,819,222.07 represents the total interest on open accounts charged to Deep Rock at 7 per cent compounded. That amounts to this:

Total interest charged at 7 per cent compounded	$4,819,222.07
Total interest at 5 per cent uncompounded	3,070,436.49
The difference, representing illegal interest on the entire account including rentals and supervision fees, is	$1,748,785.58

But interest on the supervision fees at 5 per cent annum, uncompounded, should be ENTIRELY elimina and is as follows:

Date of Charge	Amount of Fees	Interest Charged at 5% Uncompoun	
Dec. 31, 1921,	$ 99,034.83	Dec. 31, 1921, to Apr. 30, 1926,	$21,4
Dec. 31, 1924,	100,000.00	Dec. 31, 1924, to Apr. 30, 1926,	6,6
Jan. 31, 1926,	100,000.00	Jan. 31, 1926, to Apr. 30, 1926,	1,2
Dec. 31, 1926,	200,000.00		
	$499,034.83		$29,3

Date of Charge	Amount of Fees	Interest Charged at 5% Uncompoun	
Feb. 28, 1928	$ 20,000.00	Feb. 28, 1928, to Feb. 24, 1933,	$ 4,9
Dec. 31, 1928,	200,000.00	Dec. 31, 1928, to Feb. 24, 1933,	41,5
Dec. 31, 1929,	200,000.00	Dec. 31, 1929, to Feb. 24, 1933,	31,5
Dec. 31, 1930,	200,000.00	Dec. 31, 1930, to Feb. 24, 1933,	21,5
Dec. 31, 1931,	100,000.00	Dec. 31, 1931, to Feb. 24, 1933,	5,7
	$720,000.00		$105,2
		Total	$134,6

(The above figures based on Knourek's answer to the 100th interrogat

The interest on the supervision fees and rentals at annual rate of 5 per cent included in the $3,070,43 should be eliminated therefrom. Thus we have

(*a*) Total interest at 5 per cent per annum on supervisions fees $134,60

(*b*) Interest at 5 per cent uncompounded on the rental charges (see Knourek's answer to the 102nd interrogatory) is 411,79

Total interest eliminations $546,40

There should be eliminated from the total 5 per simple interest on the entire account the 5 per cent si interest on the rentals and supervision fees as follows

(a) Total simple interest at 5 per cent on entire account	$3,070,436.49
(b) Less simple 5 per cent interest on rentals and supervision fees	546,406.56
Total 5 per cent interest on account after eliminating the 5 per cent interest on the rentals and supervision fees	$2,524,029.93

Knourek, in his answer to the 102nd interrogatory, says the total interest at 5 per cent, not compounded, on the entire account after eliminating all rental interest is $2,658,637.52. If we eliminate from this the 5 per cent on the supervision fees, $134,607.59, we have the same result, to-wit: $2,524,029.93, as the lawful interest that should have been charged.

Thus we have

(a) Interest actually charged	$4,819,222.07
(b) Interest at 5 per cent after elimination of all interest on rentals and supervision fees	2,524,029.93
Illegal and deductible interest	$2,295,192.14

This entitles Deep Rock to the following deductions:

(a) Entire rental charges	$4,525,000.00
(b) The supervision fee of $1,219,034.83, less $75,000.00 allowed	1,144,034.83
(c) Interest elimination disallowed	2,295,192.14
Total deductions	$7,964,226.97

RECAPITULATION.

Total Balance, as shown on page 323 herein	$12,830,852.66
Total credits or deductions	7,964,226.97
Balance	$ 4,866,625.69

There should also be allowed the following deduction

(a) Disallowance of taxes (see pages 353-354 herein)	$ 191,565.9
(b) Unearned discount on $4,250,000.00 note (see page 178 herein)	124,300.
(c) Dividend declared December 31, 1928, and unpaid	840,672.
(d) Compound 7 per cent interest charged on above dividend	252,000.
Total	$1,408,538.
Balance brought forward	4,866,625.
Less	1,408,538.
	$3,458,087.
Less the $500,000.00 cash payment of rentals	500,000.
Balance	$2,958,087.

Refining Company stock and leases.

There should be a finding and decree adjudging *(a)* t Refining Company's lease of October 1, 1925, and the rene al thereof, fictitious, fraudulent, null and void, and *(b)* t 9,000 shares of stock of the Refining Company the prope of the Deep Rock, and as such subject to the first lien behalf of the holder of the $10,000,000.00 in notes.

This basis gives full effect to a reversal of the cre given Deep Rock by Standard for $649,999.00, original c of the Bradstreet properties, and $1,894,592.11, amount Deep Rock's expenditures in the construction and instal tion of the cracking plant and cost of development and ad tions to the Bradstreet properties, totaling $2,544,591.11, pointed out on page 323 herein.

Powers of trustee in bankruptcy.

Under Section 70-a of the Bankruptcy Statutes the trustee is vested with title to the bankrupt's choses in action.

As said in Collier on Bankruptcy, 13th ed., Vol. 2, page 1634, "He represents both the bankrupt and creditors."

Collier on Bankruptcy, 13th ed., Vol. 2, page 1047, says:

> "Rights of action arising upon contracts or from the unlawful taking or detention of, or injury to the property of the bankrupt, pass to the trustee, and he should assert them in the proper tribunal whenever necessary for the collection or preservation of the bankrupt estate.
>
> "As a general rule the trustee alone has the power to sue to recover on a claim belonging to the estate."

The same authority, Vol. 2, page 1048, says the trustee may bring such suits without leave or order of the court or referee in bankruptcy.

The same authority, page 1049, says:

> "A trustee of a bankrupt corporation succeeds to the rights of the corporation as to all rights, contractual and statutory, existing for the benefit of the corporation, and as such trustee, it is his duty to enforce such rights."

Thus a trustee in bankruptcy is entitled to sue for and recover a bankrupt stockholder's undivided interest in the profits of a corporation.

—*Matter of Brantman*, 244 Fed. 101 (2nd Cir. Apps.).

Deep Rock's defense or counterclaim vested in trustee.

The assignee under a general assignment for benefit of creditors may recover corporate assets wrongfully diverted before the incurring of the indebtedness.

Thus in *McKay* v. *Swenson*, 232 Mich. 505, 205 N. W.

583, the court sustained an action by the assignee of a g
eral assignment to recover excessive salaries paid corpor
officers prior to the creation of the indebtedness to
creditors. In other words, here the trustee in bankrup
has the right to recover by way of counterclaim and set-
Byllesby Engineering and Management Corporation sup
vision fees charged and paid prior to the bankruptcy p
ceedings. In the Michigan case, *supra*, the court said:

> "While this corporation made large profits dur
> the war, employed 500 men, and paid big dividends,
> successful operation halted when its contracts, depe
> ent upon a continuation of the war, were canceled. La
> profits alone constitute no justification for big salari
> for net profits belong to stockholders. Neither does
> fact that officers receiving such salaries are the prin
> pal stockholders bear at all upon their legal right the
> to. These officers voted the salaries to themselves, a
> then, as controlling stockholders, approved such acti
> Such action was wholly void, requires refund there
> or, at least, ast upon the officers the burden of showi
> the salaries were reasonable or to give the court inf
> mation upon which reasonable compensation could
> fixed. Defendant officers offered no justification for t
> salaries, and *in the absence of a showing of what wo*
> *have been reasonable*, the court cannot readjust as
> the *quantum meruit*, and can do no less than hold
> fendants liable *for all they received*. This brings us
> the question of whether right of recovery is in the tr
> tee, or in the corporation, or, in case of failure of
> corporate officers to act, in the stockholders. *Under*
> *assignment the recovery of the corporate assets so*
> *verted may be had and may reach back, even beyo*
> *the date of incurring indebtedness, to any point wit*
> *which the corporation could exact refund.*"

The Deep Rock's right to recover rentals paid eit
in common stock in 1928 or subsequently in money is a ch
in action vested in the Deep Rock, and upon the adjudi

tion of bankruptcy, vested in the trustee in bankruptcy. As a bankruptcy court is a court of equity with powers to administer equitable principles it is our contention that the $500,000.00 paid in cash by Deep Rock after the April 1928 stock purchase and account credit should be adjudged by the court as a payment on the Standard's general open account—that is, apply on any balance legitimately owing Standard. Nevertheless the situation is *analogous* to a suit by a corporation to recover from its officers and stockholders assets they have diverted to their own use and benefit, and the same is true with respect to Engineering and Management Corporation supervision fees which were paid.

Vice-Chancellor PITNEY (afterwards a Justice of the United States Supreme Court) in *Campbell* v. *Watson*, 62 N. J. Eq. 396, 50 Atl. 120, in sustaining the right of a receiver of a corporation to maintain an action against directors for losses alleged to have been caused by their negligence, said:

> "But it is a matter of little consequence whether the relation of trustee and *cestuis que trustent* exists between the directors of the bank and the depositors to the same degree as it does between the corporation itself and its officers, or whether it exists at all; since the loss, if any, incurred by the negligence of the officers is primarily the loss of the corporation; and the fact that, by reason of such loss, it is unable to pay its depositors in full is a mere incident. If the losses had not been sufficient to render it insolvent, or even to absorb entirely its surplus of accumulated profits, and there had been no lack of assets to pay creditors, the *right of the corporation to call the directors to account in the manner its receiver* here has done would have been perfect. The authorities cited by the defendants, hereafter referred to, establish that position. But the insufficiency of the assets of the bank to pay its debts gives the creditors a direct interest in its affairs, and they become the *cestuis que trustent* of the receiver,

entitled to enforce all the rights of the corporation, to collect its assets of every nature included in w is the right to claim damages for the negligence o directors."

In *McCullam* v. *Buckingham Hotel Co.*, 198 Mo. A 107, 199 S. W. 417, the court held that a bankruptcy t tee is not estopped from recovering corporate funds verted to pay private debts of officers by the alleged con of the directors and stockholders, since the trustee also resents corporate creditors. See, also:

Brown v. *Hammett*, 133 S. C. 446, 131 S. E. 612

Du Pont v. *Standard Arms Co.*, 9 Del. Ch. 324 Atl. 692;

Stewart v. *Ficken*, 151 S. C. 424, 149 S. E. 164

Daniels v. *Berry*, 148 S. C. 446, 146 S. E. 420;

Jones v. *First State Bank*, 158 Tenn. 356, 13 S. (2d) 326;

Webb v. *Cash*, 35 Wyo. 398, 250 Pac. 1;

Coleman v. *Booth*, 268 Mo. 64, 186 S. W. 1021;

Fletcher's Cyc., Corporations, Perm. Ed., Vol. Sec. 4824;

Breckons v. *Snyder*, 211 Pa. 176, 60 Atl. 575.

Section 47 of the Bankruptcy Law, as amended by Act of 1910, paragraph (a) thereof, requires the trus to "collect and reduce to money the property of the est for which they are trustees," and in addition to stand in the shoes of the bankrupt they "shall be deemed ves with all the rights, remedies and powers of a creditor h ing a lien by legal or equitable proceedings thereon; and a as to all property not in the custody of the bankru court" they, meaning trustees in bankruptcy, "shall deemed vested with all the rights, remedies and power a judgment creditor holding an execution duly returned satisfied."

See:

Potter Mfg. Co. v. *Arthur,* (6th Cir. Apps.) 220 Fed. 843-847;

Massachusetts Bonding & Insurance Co. v. *Kemper,* (6th Cir. Apps.) 220 Fed. 847;

Fairbanks Steam Shovel Co. v. *Wills,* 240 U. S. 642, 60 L. ed. 841;

In re Packard Press, (2d Cir. Apps.) 3 F. (2d) 233.

Bankruptcy courts exercise equity jurisdiction.

Thus Collier on Bankruptcy, 13th Ed., Vol. 1, page 39, says:

> "A bankruptcy court is a court of equity, seeking to administer the law according to its spirit, and not merely by its letter. Proceedings in bankruptcy generally are in the nature of proceedings in equity, and frequently call for the exercise of full equity powers in the ascertainment and proper enforcement of the equities of the parties; where this is so the court may apply equitable rules and will be governed by equitable principles."
>
> —*Continental Ill. Nat. B. & T. Co.* v. *C., R. I. & P. R. Co.,* 294 U. S. 648, 79 L. ed. 1110.

Ratification.

No doubt Standard will contend that its monthly statements rendered Deep Rock constitute an account stated and have the effect of an express agreement to pay the balance shown by the rendered account because not objected to by the Deep Rock. The answer to that is this: The Deep Rock was under the absolute dominion and control of the Standard, which at all times kept on the Deep Rock's Board of Directors a majority who were likewise Standard directors. There was no ratification under this situation. The majority of the Deep Rock's board of directors being also Standard directors, it could no more ratify its void or voidable act

or contract with the Standard than it could originally m
such valid contract.

In *Miner* v. *Belle Isle Ice Co.*, 93 Mich. 97, 17 L. R
412, the court, in a case involving this same principle, s

> "Here the same course of conduct has continue
> to the very commencement of this proceeding, and
> sisted in, notwithstanding its pendency. There is
> room here for any claim that the corporation has
> quiesced in or *ratified* this conduct. *A ratificatio*
> *Lorman and his dummies of his own act could not p*
> *it of its fraudulent character.*"

In *City Trust Co.* v. *Bankers' Mortgage Loan Co.*,
Neb. 532, 167 N. W. 785, the court, in holding that the *f*
ness of contracts between corporations having director
common must be shown by clear and convincing proof,
that a so-called ratification could not rise above its sou
and among other things, said:

> "The fairness of contracts between corporati
> having directors in common *must be shown by clear*
> *convincing proof*, and it must be made to appear
> they are *absolutely free from fraud.* The transactio
> February 8th undertook to take an undue advant
> of defendant, amounting to fraud, and was voidabl
> the instance of the defendant.
>
> "We are also of the opinion that the agreemen
> April 3 cannot be held to amount to a waiver or
> firmation of what was done on February 8th. The r
> fication of an unauthorized contract can take place
> where the person or body assuming to perform the
> had the power either to do it or to authorize the do
> of it in the first instance. Flack and Silver, who sig
> the agreement of April 3d, as president and secret
> in behalf of the defendant, were participants in the
> tion of February 8th. *They could not ratify their*
> *unauthorized act.*"

This rule is too well settled to justify further authorit

Statute of limitations and laches.

The statute of limitations is not binding on a court of equity, especially in a case of this kind involving a right of action growing out of a wrongful breach of fiduciary duties. There is no laches on the part of the Deep Rock as it was under the domination and control of the Standard at all times.

Ellis v. *Ward*, 137 Ill. 509, 25 N. E. 530, holds that the statute of limitations does not run against the claim of a corporation against its officers for misappropriation of corporate funds since their relation to such funds is that of trustees. In the body of the opinion the court said:

> "It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust fund *(St. Louis, etc., Min. Co.* v. *Sandoval, etc., Min. Co.*, 116 Ill. 170, 5 N. E. Rep. 370), and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que trust*, to themselves, *nor to waste, destroy, give away or misapply them (Holder* v. *Railway Co.*, 71 Ill. 106; *Cheeney* v. *Railway Co.*, 68 Ill. 570; 1 Mor. Priv. Corp., Secs. 516, 517). *And it is equally well settled that no lapse of time is a bar to a direct or express trust, as between the trustee and cestui que trust. Railroad Co.* v. *Hay*, 119 Ill. 493, 10 N. E. Rep. 29; Wood, Lim., Sec. 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute *presents no bar to this proceeding by the receiver of the corporation.* Ordinarily, an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable; and such appears to be the relation estab-

lished by law between directors and the corporation. 2 Pom. Eq. Jur., Sec. VI, p. 633; 3 Pom. Eq. Jur., Secs. 1085-1090, 1094. And see, also, as respects stockholders, *Hightower* v. *Thornton*, 8 Ga. 486; *Payne* v. *Bullard*, 23 Miss. 88; *Curry* v. *Woodward*, 53 Ala. 371. *The statute of limitations, therefore, presented no bar to a recovery by the receiver.*"

See:

Weil v. *Defenbach*, 31 Idaho 258, 170 Pac. 103.

It has been repeatedly held that the federal courts, sitting in equity, are not bound by the statute of limitations of the states, but that in proper cases the doctrine of laches will be applied in analogy to the statute of limitations of the state relating to actions at law.

In *Kelly* v. *Boettcher*, 85 Fed. 55, 62, it was said:

"In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. *Rugan* v. *Sabin*, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, and 53 F. 415, 420; *Billings* v. *Smelting Co.*, 10 U. S. App. 1, 62, 2 C. C. A. 252-262, 263, and 51 F. 338, 349; *Bogan* v. *Mortgage Co.*, 27 U. S. App. 346, 357, 11 C. C. A. 128, 135, and 63 F. 192, 199; *Kinney* v. *Webb*, 12 U. S. App. 137, 148, 4 C. C. A. 170, 177, and 54 F. 34, 40; *Scheftel* v. *Hays*, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, and 58 F. 457, 460; *Wagner* v. *Baird*, 7 How. 234, 258 (12 L. ed. 681); *Godden* v. *Kimmell*, 99 U. S. 201, 210 (25 L. ed. 431); *Wood* v. *Carpenter*, 101 U. S. 135, 139 (25 L. ed. 807). The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute the chancellor will not be bound by the stat-

ute, but will determine the extraordinary case in accordance with the equities which condition it."

—*Clarke* v. *Boysen,* (10th Cir. Apps.) 39 F. (2d) 800, 818;

Des Moines Terminal Co. v. *Des Moines Union Ry. Co.,* (8th Cir. Apps.) 52 F. (2d) 616;

Kansas City Southern Ry. Co. v. *May,* (8th Cir. Apps.) 2 F. (2d) 680;

Spiller v. *St. Louis & S. F. R. Co.,* (8th Cir. Apps.) 14 F. (2d) 284;

Kelly v. *Boettcher,* (8th Cir. Apps.) 85 Fed. 55;

Columbian Nat. Life Ins. Co. v. *Black,* (10th Cir. Apps.) 35 F. (2d) 571;

Richardson v. *Oliver,* (5th Cir. Apps.) 105 Fed. 277;

Ide v. *Trorlicht, etc., Co.,* (8th Cir. Apps.) 115 Fed. 137;

Boynton v. *Haggart,* (8th Cir. Apps.) 120 Fed. 819;

Wyman v. *Bowman,* (8th Cir. Apps.) 127 Fed. 267;

Brun v. *Mann,* (8th Cir. Apps.) 151 Fed. 145;

Broatch v. *Boysen,* (8th Cir. Apps.) 175 Fed. 702;

Vapor Car, etc., Co. v. *Gold Car, etc., Co.,* 296 Fed. 188;

United Drug Co. v. *Ireland Candy Co.,* (8th Cir. Apps.) 51 F. (2d) 226.

Alleged settlement on April 12, 1928, as of February 24, 1928, whereby Standard purchased common stock from Deep Rock and credited the same on open account.

This transaction was a forerunner of the issuance and sale of the Deep Rock's $10,000,000.00 in notes, dated March 1, 1928, due five years after date. The minutes of the regular meeting of the Deep Rock's Board of Directors held at its office at 231 South LaSalle Street, Chicago, Illinois, on April 11, 1928 (Trustee's Exhibit "X," R. Vol. 2, p. 623), recite that R. J. Graf, Vice-President of the Company, acted

as Chairman of the meeting in the absence of the President R. J. Graf at that time was Vice-President of the Byllesby Engineering and Management Corporation and a member of its Board of Directors. (See Exhibit No. 12 to "Stipulation.") He was also a member of the Board of Directors of H. M. Byllesby and Company (see Exhibit No. 13 to "Stipulation"). At that time he was also First Vice-President of the Standard and a member of its Board of Directors (see Exhibit No. 14 to "Stipulation").

As heretofore pointed out Lynch testified that the $10,000,000.00 note issue had been discussed for approximately six months before March 1, 1928. The minutes of the Directors' meeting of April 11, 1928 (Trustee's Exhibit "X," R. Vol. 2, p. 624), contain the following recitation:

> "The Chairman stated to the meeting that this Company was indebted to Standard Gas and Electric Company in the amount of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400), Four Million Two Hundred Fifty Thousand Dollars ($4,250,000) of which was represented by 6% Gold Notes of this Company due December 31, 1931 and the remaining Six Million Eight Hundred Seventy-two Thousand Four Hundred Dollars ($6,872,400) of which was owing on open account. He also stated that Standard Gas and Electric Company had offered to purchase from this Company two hundred twenty-two thousand four hundred forty-eight (222,448) shares of the common stock of this Company and in payment therefor to release and cancel said indebtedness of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400) from this Company to Standard Gas and Electric Company.
>
> "After a discussion, the following resolutions were upon motion duly made, seconded and carried, unanimously adopted:
>
> "Whereas Standard Gas and Electric Company

has offered to purchase from this Company two hundred twenty-two thousand four hundred forty-eight (222,448) shares of the common stock of this Company at the price of Fifty Dollars ($50.00) per share, or an aggregate of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400).

"Therefore, be it and it is hereby resolved by the Board of Directors of Shaffer Oil and Refining Company that said offer of said Standard Gas and Electric Company be and the same is hereby accepted and that this Company sell said stock to said Standard Gas and Electric Company for said sum.

"Upon motion duly made, seconded and carried, the following resolutions were unanimously adopted:

"Whereas, pursuant to resolutions adopted by this Board at this meeting, this Company has authorized the sale of two hundred twenty-two thousand four hundred forty-eight (222,448) shares of its common stock for the sum of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400.)

"And whereas, in the judgment of this Board it is advisable and to the best interests of this Company that of the consideration of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,-400) to be received by this Company for said shares of stock as aforesaid, Nine Million Nine Hundred Twenty-three Thousand Four Hundred Nineteen Dollars and forty cents ($9,923,419.40) shall be capital and the remaining One Million One Hundred Ninety-eight Thousand Nine Hundred Eighty Dollars and sixty cents ($1,-198,980.60) shall be surplus.

"Therefore, be it and it is hereby resolved by the Board of Directors of Shaffer Oil and Refining Company that of the consideration of Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400) to be received as aforesaid, Nine Million Nine Hundred Twenty-three Thousand Four Hundred Nineteen Dollars and forty cents ($9,923,419.40) shall be capital, and One Million One Hundred Ninety-eight

Thousand Nine Hundred Eighty Dollars and sixty c
($1,198,980.60) shall be surplus, of this Company.

"The Chairman stated to the meeting that arra
ments had been made for the conversion by Stan
Gas and Electric Company of the ninety thousand
000) shares of Convertible Preferred Stock, $7.00 C
lative, of this Company owned by it into one hun
eighty thousand (180.000) shares of common stoc
this Company.

"Upon motion duly made, seconded and car
the following resolution was unanimously adopted:

"Be it and it is hereby resolved that the proper
cers of this Company are hereby authorized to exe
issue and deliver to Standard Gas and Electric C
pany one hundred eighty thousand (180,000) share
the common capital stock of this Company upon sur
der to this Company for conversion into said com
stock, of ninety thousand (90,000) shares of the Con
ible Preferred Stock, $7.00 Cumulative."

Graf's statement, above quoted, that the Deep Rock wa
debted on open account to the Standard in the sum of
872,400.00 was an error, as shown by the last page of Kn
ek's answer to the 64th interrogatory. The correct am
as of February 24, 1928, the basic date, was $6,836,19
but this is not very material.

As a matter of fact, the authority for the issuanc
the $10,000,000.00 March 1, 1928 notes was considered
directed at a meeting of the Deep Rock's Directors hel
March 9, 1928, at 231 South La Salle Street, Chicago,
nois, at which meeting eight of the nine directors pre
were also directors and officers of the Standard. (Trust
Exhibit "X," R. Vol. 2, p. 625.) The March 9, 1928 mee
authorized Deep Rock's officers to approve the contract
tered into on March 6, 1928, by and between the Deep R
"executed on" its behalf "by J. J. O'Brien, its Presider
and H. M. Byllesby and Company, Janney & Co. and Fed

Securities Corporation, designated as the "Bankers." (R. Vol. 2, pp. 628-629) A copy of this contract with the Bankers will be found in Trustee's Exhibit "X," page 101, etc. This contract with the Bankers required the Deep Rock to cause a change in its capital stock and the retirement of its indebtedness, and among other things recites the following (Trustee's Exhibit "X," page 106), to-wit:

> "*(d)* Said Standard Gas and Electric Company shall purchase, at the price of Fifty Dollars ($50) per share, two hundred twenty-two thousand four hundred forty-eight (222,448) shares of said common stock and, in payment therefor shall release and cancel Eleven Million One Hundred Twenty-two Thousand Four Hundred Dollars ($11,122,400) of indebtedness from the Company to Standard Gas and Electric Company."

Although the Standard was not formally a party to this contract with the Bankers it did purchase at $50.00 per share 222,448 shares of Deep Rock's common stock and paid for the same by giving the Deep Rock credit on open account in the sum of $6,836,195.85, the full face amount of the $4,250,000.00 December 1926 Deep Rock note due in five years after date, and $42,400.00 additional credit applied on the purchase of 848 shares of common stock of the Deep Rock at $50.00 per share. In other words, the 222,448 shares of common stock were divided into two parcels, 221,600 shares at $50.00 per share, and 848 shares at $50.00 per share.

In regard to this transaction Lynch testified (Tr. 291):

A. "Well, I would answer that question by saying that when the $10,000,000.00 note financing was contemplated, in my *official capacity* it was necessary for me to negotiate with the *bankers* the probable sale of such notes. The balance sheet of the company reflected indebtedness to Standard Gas and Electric Company certain amounts of preferred and certain amounts of common. They did not present a picture wherein it would be *possible to float or sell an issue of ten million of notes on Deep Rock*

Oil Corporation or Shaffer Oil and Refining Compan
The *bankers would agree to the handling of that note*
sue only in consideration of Standard Gas and Electr
Company taking common stock for its open indebte
ness, and also for the amount of preferred stock whi
it held at that time.

Q. What was their reason for making such a requiremen

A. The requirement *was for the sale of the notes,* the qu
ification of them under *blue sky laws.* It *could not ha*
been done if we had the interest charges embrace int
est of open account other than these notes, and also
the common stock structure, or basement, as we call
was not sufficiently large to support the preferred a
notes that preceded it. That is proper, and also us
as a measuring stick in a financial structure.

Q. In other words, they did not want a top-heavy structu
as they call it.

A. Well, it has two meanings. The first is that with respe
to the lien of the different securities; namely, debe
tures, preferred and common. It also has the same e
fect with regard to the earnings. The earnings will co
in similar order, and you must have so many times t
property value, so many times earnings, for each cla
of security.

Q. At the time that this transaction took place, what amou
of open account, approximately, was claimed by Stan
ard Gas and Electric Company against Shaffer Oil a
Refining Company, as it was then known.

A. I would want to look at the record to make sure of tha
I haven't any memorandum in front of me with respe
to that question.

Q. You may refer to this (handing paper to the witness

A. The indebtedness of Shaffer Oil and Refining Compan
or Deep Rock Oil Corporation, to Standard Gas an
Electric Company, was $6,836,195.85 on February 2
1928.

Q. At that time were there any notes to Shaffer Oil an
Refining Company which were held by Standard Ga
and Electric Company?

A. In addition to that $6,836,195.85, Standard also owned the promissory note of Shaffer Oil and Refining Company, or Deep Rock Oil Corporation, in an amount of $4,250,000; the aggregate of those two figures being $11,086,195.85.

Q. And is it that amount to which you refer when you say that the *bankers required* that Standard accept common stock for their account?

A. Yes."

This transaction was carried out by Standard's purchase of the 222,448 shares of Deep Rock's common stock which absorbed and paid the $4,250,000.00 December 31, 1926 Deep Rock note to Standard, and Standard's open account balance, which left the Standard indebted to the Deep Rock in the sum of $36,204.15. (See last page of Knourek's answer to the 64th interrogatory.) As a part of this transaction Standard also exchanged 90,000 shares of Deep Rock preferred stock for 180,000 shares of Deep Rock common stock. (See Trustee's Exhibit "X", page 172.) Prior to that time the two other transactions between the Standard and Deep Rock are important. Deep Rock's directors, at a meeting held April 16, 1926, at 231 South La Salle Street, Chicago, Illinois (Trustee's Exhibit "X", pages 75-76), authorized the issuance, negotiation and sale of the 80,000 shares of its preferred stock "at a price *not less than par* and that in the negotiation and sale of said stock this Company pay such commissions and other expenses as may be necessary and that the proper officers of this company be and they are hereby authorized, empowered and directed for and in the name and behalf of the Company to sign and seal in the name of the Company a certificate or certificates aggregating not exceeding 80,000 shares of the preferred capital stock of the Company." $100.00 was the par value of the preferred stock, but it appears that the Standard, in April, 1926, purchased from the Deep Rock

the 30,000 shares of preferred stock at $90.00 per sh plus accrued dividends. This lacked $10.00 per share b par. This indicates a brokerage fee for selling Deep R preferred to Standard. *Who got it is not shown. Such a was waste.* This would be $7,200,000.00 plus accrued d dends of $23,333.33. (See Knourek's answer to the 64th terrogatory; R. Vol. 2, p. 129.) As shown by Knour answer the Standard credited the Deep Rock on open count with $7,223,333.33.

On April 27, 1926, the Deep Rock's directors, at a m ing held at 231 South La Salle Street, Chicago, Illinois, thorized the issuance and sale of $7,500,000.00 of its six cent Gold Notes to be dated April 15, 1926, payable A 15, 1928. (Trustee's Exhibit "X," page 78, etc.) It is h worthy of note that each of the nine Deep Rock direct present at said meeting were also officers and director the Standard or Engineering and Management Corporat with the exception of J. H. Roemer, and he was Standa general counsel. These $7,500,000.00 six per cent notes w brokered through H. M. Byllesby and Company, Janney Co. and Federal Securities Corporation. (See Trustee's hibit "X", page 82.) That these notes were sold, not the benefit of the Deep Rock, but for the immediate ben of the Standard is shown by Knourek's answer to the 6 interrogatory, from which it appears that Standard, not the Deep Rock, received the proceeds of the notes. T proceeds of the sale did not even go through Deep Roc hands or bank account. (R. Vol. 2, p. 97)

On December 31, 1926, Deep Rock executed to Stand its promisory note for $4,250,000.00, maturing December 1931 (See Exhibit "B" to Knourek's answer to the 31st terrogatory.) On December 31, 1926, Standard credi Deep Rock's open account with $4,080,000.00, thus discou ing it $170,000.00 as heretofore pointed out. Before the

plication of the credit of $4,080,000.00 Deep Rock was indebted to the Standard in the sum of $1,748,674.47 on December 31, 1926, and by that credit Standard became indebted on open account to Deep Rock in the sum of $2,331,325.53. (R. Vol. 2, p. 143.) What we are driving at is this: Standard's open account up to that date against Deep Rock was fully satisfied on April 30, 1926, out of the proceeds of Standard's purchase of 80,000 shares of Deep Rock's preferred stock *and* the proceeds of the sale of the $7,500,000.00 two-year Deep Rock note of date of April 15, 1926, and the accumulated balance against the Deep Rock between April 30, 1926, and December 31, 1926, was fully paid by the Deep Rock's $4,250,000.00 five-year six per cent note. (R. Vol. 2, p. 134)

(NOTE: These transactions, without hereafter repeating them, are important as showing that the Standard conducted the Deep Rock's affairs as one of its own departments and controlled the Deep Rock as one of its agencies, and as hereafter pointed out, whatever balance is due the Standard should be subordinated to the claim of the $10,000,000.00 note holders.)

The Trustee is not seeking to rescind or cancel either the preferred stock purchase of April, 1926 (see Knourek's answer to the 66th interrogatory and the 100th interrogatory) or the common stock purchase of April 12, 1928. The Standard ram-rodded all these transactions. There is no claim the preferred stock on April 16, 1926, was worth less than $90.00 per share. As Standard sold 1,000 shares of Deep Rock preferred on February 21, 1929, for $99,027.78 plus accrued dividends (R. Vol. 2, p. 114) it must have been worth over par in 1926, Deep Rock's most prosperous year. Trustee claims Standard's payment for the stock by cancelling a fictitious and fraudulent claim was no payment at all —same situation if it had paid in counterfeit money. The rentals above charged Deep Rock and credited off by the

April, 1928 deal amounted to $1,575,000.00. (R. Vol. 2, 130) The Standard was in absolute control of Deep R and knew better than anyone the value of its prefer stock. There does not appear to have been any financ necessity for its sale at less than it was worth. That preferred stock was highly desirable and valuable at t time is shown by Standard's own declaration contained its Annual Report for the year ending December 31, 19 wherein it said:

> "The Sl affer Oil and Refining Company again creased its ea nings. For 1926 gross earnings advan 43.23 per cent and *net earnings before retirement serve and depletion* 36.52 per cent, compared with 19 As a result that Company resumed the payment of re lar dividends on its 7 per cent preferred stock, p the accumulated preferred dividends, amounting 19¼ per cent, and declared an initial cash dividend $7 a share on its common stock, 93.79 per cent of wh is owned by Standard Gas and Electric Company (R. Vol. 2, pp. 595-596)

Deep Rock's net earnings had greatly increased in 19 over 1924 and in 1926 over 1925. (See Standard's Exhib 13 and 14 and Standard's annual report for the year en ing December 31, 1926, R. Vol. 2, pp. 595-596.)

Now as to the common stock value in 1926 when Sta ard fixed a value of $50.00 per share, we find Standard its Annual Report for the year 1928, page 9, says:

> "Shaffer Oil and Refining Company reported sat factory progress for 1928. Higher market prices f refined products resulted in increased earnings as co pared with 1927. Although crude oil production w curtailed slightly the refinery was operated at capac during the entire year, with operating costs the low on record. The Company continued its policy of acqu ing desirable acreage for drilling." (R. Vol. 2, p. 59

Standard's Annual Report for 1928, page 21, sho

Deep Rock's operating net earnings in 1928 increased over 1927 by over $1,000,000.00 and by Standard's Exhibits 13 and 14, it appears Deep Rock's actual net earnings in 1928 increased over those of 1927 by $418,500.00.

In the absence of evidence to the contrary the presumption is that the preferred stock was worth its par value and the burden is on Standard to prove otherwise.

—*Harris' Appeal,* (Pa.) 12 Atl. 743;
Thompson v. *Metropolitan Bldg. Co.,* 95 Wash. 546, 164 Pac. 222;
Moffit v. *Hereford,* 132 Mo. 513, 34 S. W. 252.

There is no evidence that the Deep Rock's $4,250,000.00 note of December 31, 1926, was worth less than par, although the Standard discounted it $170,000.00. There is no evidence as to the reasonable value of the 222,448 shares of Deep Rock's common stock on April 12, 1928. The Standard put its valuation of $50.00 per share on the common stock, which had the *voting* power, and also on the preferred stock, and although Lynch testified the common stock had no market value, it is our contention that the Standard, having fixed the value of the stock, is bound by the valuation, and that being true, we contend that the Deep Rock has overpaid Standard *(a)* in cash, *(b)* in preferred stock at $90.00, and *(c)* common stock at $50.00, all of which, added to unpaid illegal and unjust debits, entitles Deep Rock to a deduction of $8,280,093.22, as follows:

(a) Rental charges	$4,525,000.00
(b) Engineering and Management Corporation supervision fees	1,144,034.83
(c) Excess interest charges	2,295,192.14
(d) Refining Company's income taxes	191,565.91
(e) Unearned discount on the $4,250,000.00 December 31, 1926 note	124,300.34
	$8,280,093.22

This does not exclude illegal dividend of $840,672.00 a
terest thereon. (See pp. 353 and 323 herein.)

The Standard occupied a high fiduciary relatio
to the Deep Rock and was bound to exercise towar
Deep Rock "the utmost good faith and scrupulous hon
in all its dealings with the Deep Rock, See:

Trice v. *Comstock*, 121 Fed. 620;
Iroquois Iron Co. v. *Kruse*, 241 Fed. 433;
Geddes v. *Anaconda Copper Min. Co.*, 254
590.

Point Four.

**Assuming for argument the Deep Rock can not re
by way of set-off wrongful and excessive payments of
tals, engineering and management supervision fees, u
ful interest, taxes and discounts paid by *(a)* the pur
of 80,000 shares of Deep Rock's preferred stock on
16, 1926, "in partial satisfaction of open account inde
ness due from Deep Rock at that time" (R. Vol. 2, p.
and by the proceeds of the April 15, 1926 Deep Rock
500,000.00 two-year notes (Knourek's answer to the
interrogatory), *(b)* the $4,250,000.00 December 31,
note that day credited to Deep Rock, and *(c)* the 22
shares of common stock on April 12, 1928, as of Febr
24, 1928, then it is the Trustee's contention that all wro
and excessive charges made by the Standard from and
er February 24, 1928, should be disallowed and expu
from the account.**

***(1)* Rentals.**

(1) None of the rental charges were paid in who
in part by Standard's purchase of the 80,000 share
Deep Rock preferred stock in April, 1926, because the
rental charge or debit was made in July, 1926, in the su
$525,000.00. (R. Vol. 2, pp. 124 and 131.)

(2) The $825,000.00, being the rentals for the last three months of 1925 and the 12 months of 1926, were paid by the credit given Deep Rock on December 31, 1926, for its $4,250,000.00 five-year note of that date.

(3) The common stock purchase on April 12, 1928, and credit on open account as of February 24, 1928, paid the rentals for the year 1927 ($600,000.00) and January, 1928 ($50,000.00), making a total of $1,475,000.00.

After Standard's February 24, 1928 open account balance was settled by the April, 1928 issuance to Standard of Deep Rock's common stock, Standard charged Deep Rock on open account for rentals as follows (R. Vol. 2, pp. 132-133):

1928—11 months	$ 550,000.00
1929—12 months	600,000.00
1930—12 months	600,000.00
1931—12 months	600,000.00
1932—12 months	600,000.00
1933— 2 months (Jan. and Feb.)	100,000.00
Total	$3,050,000.00

(NOTE: Deep Rock made the following payments after the April, 1928 settlement, which Standard credited as rentals:

1928	$300,000.00
1932	100,000.00
1933	100,000.00
	$500,000.00

This $500,000.00 should be treated *not* as a credit on rentals, but on Standard's claim.)

(2) Interest on rentals.

Item (a)—*Paid rentals.* Standard charged interest on the $300,000.00 rentals actually paid by Deep Rock's checks during the year 1928

for the months of May to October, inclusive, as these rentals were not paid on maturity. The 7 per cent compound interest on the $300,000.00 totaled.....$ 1,410.

Item (b)—*Unpaid rentals.* Interest on *unpaid* rentals charged after the February 24, 1928 common stock payment (see Knourek's answer to the 99th interrogatory and pages 174 to 177 in this brief and abstract..... 483,252.

Total interest charged on paid and unpaid rentals accruing since February 29, 1928.....$484,663.
(R. Vol. 2, pp. 131, 132, 133 and 134)

Engineering and Management supervision fees.

Item (a)—*Unpaid supervision fees.* Since the common stock payment on open account as of February 24, 1928, Standard has charged Deep Rock with Management supervision fees in the aggregate sum of.....$720,000.0
(R. Vol. 2, p. 134)

Item (b)—The 7 per cent compound interest charges on these unpaid Management supervision fees amounted to.....$165,434.7
(R. Vol. 2, p. 134)

Total unpaid supervision fees and 7 per cent compound interest.....$885,434.7

Recapitulation of deductions.

Omitting for the moment further *deductions* of excess compound interest charges at 7 per cent instead of simple 3 per cent, we have the following deductions:

(a) Rentals charged after February 24, 1928.....$3,050,000.0

(b) Charged interest on unpaid rentals

and interest on rentals paid since February 24, 1928	484,663.28
(c) Unpaid supervision fees	720,000.00
(d) Charged interest on unpaid supervision fees	165,434.74
Total deductions	$4,420,098.02
Standard's balance against Deep Rock, shown by Exhibit "A" to Standard's claim	$9,342,642.37
Less above deductions	4,420,098.02
Total allowable to Standard	$4,922,544.35

Further deductions for excess interest.

(a) Exhibit "A" to Standard's claim contains a charge of 7 per cent compound interest for the year 1928 in the sum of $166,302.81. The only interest charges made in the year 1928 in Standard's open account against the Deep Rock up to and including February 24, 1928, as shown by Knourek's answer to the 64th interrogatory, are

(1) "Interest on open account December 24, 1927, to January 24, 1928"	$ 37,179.12
(2) "Interest on open account January 24, 1928, to February 24, 1928"	40,255.04
Total	$ 77,434.16

(R. Vol. 2, p. 252)

The above total of $77,434.16 deducted from the total interest charges for the year 1928, $166,302.81, leaves $88,868.65 which of course represents the 7 per cent compound interest accruing and charged during the year 1928 *subsequent* to February 24, 1928.

Exhibit "A" to Standard's claim, taken in connection with Knourek's answer to the 64th interrogatory, shows 7 per cent compound interest *charges* from and after Feb-

ruary 24, 1928, on the *whole* account, including rentals and supervision fees, as follows:

1928	$ 88,868.6
1929	199,761.4
1930	351,707.7
1931	516,288.0
1932	620,581.7
1933	111,250.1
Total 7 per cent compound interest accruing and charged since February 24, 1928	$ 1,888,457.6

(R. Vol. 2, p. 252)

As shown by Paragraph 47 of the "Stipulation" the interest on open account balances since February 24, 1928, computed at 5 per cent simple interest per annum to February 28, 1933, is $1,193,045.31.

Thus we have

(1) Total 7 per cent compound interest charged from February 24, 1928, to February 24, 1933	$1,888,457.62
(2) Interest computed at 5 per cent per annum on the same account covering the same period	1,193,045.31
Item (1)—Illegal interest	$ 695,412.31

(R. Vol. 2, p. 252)

The above Item (1)—$695,412.31—is the excess and illegal interest on the Standard's entire account charged between February 24, 1928, and February 24, 1933, and as such should be deducted from Standard's account.

But this is not sufficient deduction. Included in the $1,193,045.31 is 5 per cent interest on *(a)* the unpaid rentals, *(b)* $300,000.00 rentals paid in 1928, and *(c)* unpaid Management Corporation supervision fees charged since February

24, 1928. The interest on (a), (b) and (c) above should be eliminated.

Thus we have

(1) Total 5 per cent interest on Management supervision fees charged after February 24, 1928, calculated on the basis of Knourek's answer to the 100th interrogatory, set up on page 324 herein	$105,233.32
(2) Interest at 5 per cent per annum on "Item (a)—Paid Rentals" and "Item (b)—Unpaid Rentals," set forth at 7 per cent on pages 347-348 herein as $484,663.28	379,137.95

(R. Vol. 2, p. 136)

Thus on the assumption 5 per cent is the legal interest chargeable, we state the account as follows:

DEDUCTIONS:

(a)	Rentals charged after February 24, 1928	$3,050,000.00
(b)	Interest on paid and unpaid rentals charged since February 24, 1928, at 5 per cent	379,137.95
(c)	Unpaid supervision fees	720,000.00
(d)	Interest at 5 per cent on unpaid supervision fees	105,233.32
(e)	Excess of 7 per cent compound interest charged since February 24, 1928 ($1,888,457.62) over 5 per cent simple interest ($1,193,045.31) amounting to.	695,412.31
	Total deductions	$4,949,783.58
(f)	Standard's claim	$9,342,642.37
		4,949,783.58
(g)	Balance on that basis	$4,392,858.79

DEDUCTIONS COMPUTED ANOTHER WAY.

Deducting the five per cent interest on *(a)* rentals, a
(b) Management Corporation supervision fees charg
since February 24, 1928, to-wit, $484,371.27, from the fi
per cent interest on Standard's entire open account accr
ing since February 24, 1928, to-wit, $1,193,045.31, we ha
as lawful interest chargeable on Standard's claim sin
February 24, 1928, the sum of $708,674.04. The seven p
cent compound interest charged in Standard's open accou
since February 24, 1928, is $1,888,457.62 (see paragraph
of "Stipulation"). Thus we have

(a) Seven per cent compound interest since February 24, 1928	$1,888,457.6
(b) Lawful interest since February 24, 1928	708,674.0
Illegal and excess interest	$1,179,783.5

This re-casts the deductions as follows:

(a) Rentals charged after February 24, 1928	$3,050,000.0
(b) Engineering and Management Supervision fees charged after February 24, 1928	720,000.0
(c) Illegal and disallowable interest charged since February 24, 1928	1,179,7[illegible]58
Total deductions	$4,949,783.58
Standard's balance against Deep Rock shown by Exhibit "A" to Standard's claim	$9,342,642.37
Less above deductions	4,949,783.58
Balance	$4,392,858.79

Deduction of Refining Company's Federal

Income taxes charged to Deep Rock after April, 1928	$ 60,750.00
Standard's balance (without reference to dividends)	$4,332,108.79

DIVIDEND.

Dividend declared December 31, 1928	$ 840,672.00
7 per cent interest charged from January 15, 1929, to February 28, 1933	252,000.00
Total	$1,092,672.00
Total balance above brought down	$4,332,108.79
Less dividend and interest	1,092,672.00
Balance allowable to Standard	$3,239,436.79

Disallowance of taxes.

According to Knourek's answer to the 64th interrogatory the Standard, in December, 1926, wrongfully charged the Deep Rock with the Refining Company's 1925 Federal income tax in the sum of	$ 29,565.91

According to Knourek's answer to the 21st interrogatory (see also Tr. 537) Standard wrongfully charged to Deep Rock the Refining Company's federal income taxes as follows:

July, 1927, first half 1926 income taxes	40,500.00
September, 1927, third quarter 1926 income taxes	20,250.00
December, 1927, fourth quarter 1926 income taxes	20,250.00
April, 1928, first quarter 1927 income taxes	20,250.00
Total	$ 130,815.91

(NOTE: The above items in Standard's account were paid by the April, 1928, issuance of Deep Rock common stock to Standard.)

The following income tax payments have not been p
and should be disallowed, to-wit:

July, 1928, second quarter 1927 income taxes	$ 20,250
September, 1928, third quarter 1927 income taxes	20,250
December, 1928, fourth quarter 1927 income taxes	20,250
Total	$ 60,750

(KERR'S answer to the 7th interrogatory.)

This income tax was a direct and immediate result
the unconscionable, unfair, and void lease made by the
fining Company to the Deep Rock. This lease created a fi
tious Refining Company income of $50,000.00 a month up
which the Federal Government assessed an income t
which was a direct result of the Standard's wrongful
and in fact was fictitious and wrongfully charged to
Deep Rock. *But for the fraudulent lease there would h
been no apparent income.* As these income taxes w
charged to the Deep Rock for the years 1925, 1926 and 19
(after the execution of the October 1, 1925 lease and
purported purchase by the Standard of Deep Rock's 9,
shares of Refining Company stock) these charges constitu
an admission by Standard that the Deep Rock owned
Refining Company stock or its assets, and that Standar
purported purchase of the Refining Company's stock wa
mere sham.

However, Standard *now*, in order to evade the full fo
and effect of these circumstances, undertakes to justify
charge against the Deep Rock for these taxes aggregati
$191,565.91 on the ground that the October 1, 1925 lease
quired the Deep Rock to pay the income taxes on the rent
accruing or paid unde the lease. There is not a word

phrase in either the original October 1, 1925 lease or the renewal thereof justifying the contention that the lessee, Deep Rock, was obligated to pay either state or federal income taxes on the rentals paid or accruing under the leases. The original and the renewal lease each obligates the lessee "to pay and account for all operating expenses, interest, depreciation and depletion in connection with said property and to pay any and all carrying charges that might be incurred in connection with said property, and in addition thereto shall pay to the Deep Rock Oil and Refining Company" the monthly rentals therein mentioned. If the lease had contained a provision requiring the Deep Rock, as lessee, to pay all taxes, it would not have included federal or state income taxes. Standard, through the Management Corporation, was continuously charging Deep Rock with fees of its, Standard's, attorneys, and must be held fast to the presumption it knew the law.

(NOTE: In *Catawissa R. Co.* v. *Philadelphia & R. Ry. Co.*, 255 Pa. 269, 99 Atl. 807, the court expressly held that the lessee of railroad property agreeing to pay taxes and charges levied during the term under any existing or future law was not obligated to pay the income tax subsequently imposed upon the lessor's rental. The court held the income tax was not imposed upon the demised premises, or any part thereof, nor on the business, nor on the receipts, gross or net, derived therefrom, nor upon the capital stock of the lessor or the dividends thereon.

In *Codman* v. *American Piano Co.*, 229 Mass. 285, 118 N. E. 344, the Supreme Judicial Court of Massachusetts held that words in a lease are to be interpreted in accordance with their natural and ordinary meaning, and that the covenant in a lease obligating the lessee to pay all taxes and assessments which might be payable for or in respect of the leased premises during the term of the lease, did not include income taxes. The court said:

"What is meant by taxes for or in respect of t
leased premises? The legal signification clearly is th
the taxes are those which relate directly to the pre
ises themselves and not to the rent reserved whi
when due, is a separate and independent estate. T
fundamental fact on which the rights of the parties d
pend is that the defendant never agreed to pay t
taxes on the rent. In *Catawissa Railroad* v. *Philad
phia & Reading Railway*, 255 Pa. 269, 99 Atl. 807,
was said:

> 'The income tax was not imposed by the go
> ernment upon "the demised premises or any pa
> thereof." * * * It was imposed upon rental receiv
> by the lessor from the lessee.'

"The words chosen by the parties cannot fairly
extended by us beyond their natural or ordinary mea
ing, and therefore the defendant cannot be held liab
for taxes which the covenant neither by express wor
nor reasonable implication obliged him to pay. *Smi
v. Abington Savings Bank*, 165 Mass. 285, 42 N. E. 113
Williams v. *Monk*, 179 Mass. 22, 60 N. E. 394; *V
Rensselaer* v. *Dennison*, 8 Barb. (N. Y.) 23; *Woodru
v. Oswego Starch Factory*, 177 N. Y. 23, 68 N. E. 99
Millard v. *Delaware, Lackawanna & Western Railroa
240 Pa. 234, 87 Atl. 601; *Tennant* v. *Smith*, (1892) Ap
Cas. 150."

In *Kimball* v. *Cotting*, 229 Mass. 541, 118 N. E. 86
L. R. A. 1918-C, page 1189, the Massachusetts Supren
Judicial Court held that the lessee was obligated to pa
income taxes where the lease expressly provided tha
the lessee "covenants and agrees to pay and discharg
any taxes or excises which during the term may on an
assessment day be lawfully levied or assessed to eithe
the lessors or the lessees upon or against the rent pay
able hereunder," etc.

That the lessee is not obligated to pay taxes on th
rents in the absence of an express covenant to that ef
fect, see, also:

Woodruff v. *Oswego Starch Factory*, 177 N. Y. 2
68 N. E. 994;

J. L. Hammett Co. v. *Alfred Peats Co.*, 217 Mass. 520, 105 N. E. 370, L. R. A. 1915-A, 334, and long annotation.)

These Federal income taxes to the amount of $60,750.00 not having been paid, should be disallowed.

Point Five.

Standard exercised its power of control over the Deep Rock so as to make the Deep Rock its agent and adjunct and one of its departments, and for this reason whatever amount is allowed Standard on its claim filed in this case should be subordinated to the claims of the holders of the March 1, 1928 $10,000,000.00 Deep Rock notes and claims of other creditors, and participation in the assets of the Deep Rock postponed until the claims of all other creditors have been fully satisfied therefrom, and if Deep Rock's assets are insufficient to pay all of its creditors, then the Standard should be adjudged primarily liable to pay Deep Rock's $10,000,000.00 March 1, 1928 notes and all other claims against it.

In *Westinghouse Electric & Mfg. Co.* v. *Allis-Chalmers Co.*, (3rd Cir. Apps.) 176 Fed. 362, the court said:

> "The issues settled by the pleadings establish that the Allis-Chalmers Company owns the controlling majority of the stock of the Bullock Electric Manufacturing Company, which furnished the infringing apparatus but the bill does more than charge such corporate control as might result merely from such majority ownership, *and that some of the directors of one company are also directors of the other.*"

The court further said:

> "In corroboration of these averments it is charged that the Allis Chalmers Company *advertised its entry upon the electrical field*, giving as its reason the facts

that it has acquired the plant of the Bullock Compan that its own electrical department consisted of or co prised the plant of the Bullock Company, and that i intention was to go on with the manufacture of the Bu lock Company's product. Since these significant ave ments are either admitted in terms, or are only met b the formal denial of control, 'save as the Allis-Chalme Company is lawfully entitled thereto as the holder such majority of stock,' we think the situation justifi a court in acting upon it. The two corporations eviden ly *preserve their separate organizations;* but the co *trol* of the Bullock Company's business is exercised b the Allis-Chalmers Company, which has taken over a that is valuable in this business and made *it a depar ment of its own.*

"The substance of the matter is that the Allis Chalmers Company is the *unquestioned master,* whos orders are obeyed, and we think that under such ci cumstances a court of equity may well look behind th corporate screen and determine where the real and re sponsible power lies. It is not a question where the fo mal legal title to the property rests. The bill avers—an the answer passes the averment over in silence—tha even the ownership of the property may have passed for it charges that either the ownership of the propert has been transferred, or, if not the ownership, *at leas the control,* and the answe confines such denial as i made solely to the transfer of control, and says noth ing whatever about the transfer of ownership. But w lay *no stress upon the ownership* of the legal title t the property. It is enough for the present purpose t note that on the face of the pleadings the power to con trol, operate and manufacture is in the Allis-Chalmer Company and is being exercised by that company. I our opinion, therefore, it is liable for the infringing ac complained of as being its own act done through a con trolled agency."

Standard owned at all times practically 98 per cent o Deep Rock's common stock and a substantial part of it

preferred stock, which had no voting power except on failure to pay dividends thereon. The fact that Standard did not own all the stock is immaterial. Standard at no time permitted the preferred stockholders to acquire the right to vote their stock. The fact that Standard, as a holding company, was engaged principally in the public utility business and not generally in the oil business is immaterial, and in no sense refutes our contention that the Deep Rock was a department of the Standard and its agent and adjunct.

(NOTE: See authorities cited herein on pages 207 to 209, inclusive.)

Illustrative cases.

(a) In *In re Kentucky Wagon Mfg. Co.*, 3 Fed. Supp. 958, affirmed by the Sixth Circuit Court of Appeals in 71 F. (2d) 802, a wagon manufacturing corporation was adjudged an agency and department of a bank.

(b) In *Portsmouth Cotton Oil Refining Corporation* v. *Fourth National Bank*, 280 Fed. 879, affirmed by the Fifth Circuit Court of Appeals in 284 Fed. 718, the court held that an oil and feed corporation was a department of a national bank and that the bank was liable for damages sustained by a purchaser of property from the oil and feed corporation.

(c) In *United States* v. *Reading Co.*, 253 U. S. 26, 64 L. ed. 760, the court held that a coal mining corporation was an agency, adjunct and department of a railroad company.

(d) In *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255, 65 L. ed. 253, the court held that a coal mining corporation was an agency and department of a railroad company.

(e) As above stated, the fact Standard did not own all of Deep Rock's stock is immaterial. It owned substantially 98 per cent of the voting stock, which gave it absolute control.

In *Commissioner of Internal Revenue* v. *Shillito Realty Company,* (6th Cir. Apps.) 39 F. (2d) 830, the dominating and controlling company did not own near all the stock. The authorized capital was $1,200,000.00, divided equally into preferred and common stock, "both with full voting power." The dominant corporation, the John Shillito Company, organized in 1882, caused the Shillito Realty Company to be organized in 1914, and deeded to the latter corporation certain lands and buildings for which it received $600,000.00 in cash and all of the common stock of the Realty Company of the par value of $600,000.00. The cash payment was made from money received *from the sale of the preferred* stock "to stockholders of the store company and to others." Nevertheless, the court held the Shillito Realty Company and the John Shillito Company constituted a single enterprise, saying:

> "The *relationship and mutual dependency* of the two companies were such as to effect a *complete unity of interest and enterprise.* The corporate activity of the realty company was non-existent save for the purposes of the store company. It was a single business enterprise. It is true that the preferred stock had voting rights, but to what purpose? It could neither increase its dividend nor redeem itself, *nor influence the policy or purpose of its management.*"

Standard's common stock ownership control.

There was no time the Standard could have lost control even if the preferred stock had acquired the right to vote. The preferred stock had no voting power "on any question" unless the dividends thereon were in default for a period of six months. During the dividend default the preferred stock had voting power, "but upon the resumption of the payment of dividends at the rate of 7% per annum the voting power upon such stock shall again cease." There

has been no period during the existence of the Deep Rock when the preferred stock was outstanding in a sufficient amount to out-vote the Standard's voting power under its ownership of common stock.

As pointed out herein the capital stock of the Deep Rock was authorized and issued as provided for in the the contract of May 20, 1919 (R. Vol. 2, p. 635), between H. M. Byllesby and Company and C. B. Shaffer. Under that contract Byllesby and Company subscribed for 120,000 shares of the common stock and Shaffer subscribed for 80,000 common stock, and as the common stock had the voting power and thus the Byllesby interest controlled, Shaffer, to avoid such control, had inserted in the contract of May 20, 1919, a voting trust agreement which divided 50-50 the control between Shaffer and the Byllesby interest. This continued until March 14, 1921, when Shaffer went out of the Deep Rock under an agreement set forth in claimant's Exhibit 1, dated March 14, 1921. (R. Vol. 2, p. 632) Under that agreement Shaffer delivered to the Standard 50,000 shares of preferred stock of the par value of $100.00 and 80,000 shares of common stock, and his directors resigned and stepped out. This therefore gave the Standard all the issued and outstanding common stock, to-wit, 200,000 shares.

Under the contract of May 20, 1919 (claimant's Exhibit 2) the Byllesby interest obligated itself to purchase 50,000 shares of preferred stock of the par value of $100.00, which, added to the 50,000 shares issued to Shaffer, made 100,000 shares of preferred. However, there is no record of 100,000 shares of preferred stock outstanding at any one time before 1923.

According to Deep Rock's Annual Report for the year ending December 31, 1921 (R. Vol. 3, p. 118), there were only 60,000 shares of preferred stock outstanding.

According to Deep Rock's Annual Report for the year ending December 31, 1922, there were only 60,000 shares of preferred stock outstanding. (See Trustee's Exhibit ...)

Deep Rock's Annual Reports for 1920, 1921 and 1922 show that there were outstanding only 160,000 shares of common stock. Deep Rock's Annual Report for 1920 stated in a note that Standard owned over 95 per cent of Deep Rock's common stock, and Deep Rock's Annual Reports for the years 1921 and 1922 state that Standard owned over 98 per cent of Deep Rock's common stock.

(NOTE: For stock issues, preferred and common, for other years, see R. Vol. 3, pp. 103 to 121.)

1923.

Standard's annual report for the year ending December 31, 1923, page 12, states that Standard owned 11,969 shares of Deep Rock's preferred stock and 158,000 shares of common stock.

1924.

Standard's annual report for the year ending December 31, 1924, page 12, states that Standard owned 11,969 shares of Deep Rock's preferred stock and 158,000 shares of common stock.

1925.

Standard's annual report for the year ending December 31, 1925, page 12, states that Standard owned 11,969 shares of Deep Rock's preferred stock and 158,000 shares of common stock.

As shown by Trustee's Exhibit "X," pages 75 and 76, the Deep Rock at a meeting of its directors on April 16, 1926, authorized the issuance, negotiation and sale of 80,000 shares of its preferred stock at not less than $100.00 par, and from Knourek's answer to the 64th interrogatory it appears that the Standard, in April, 1926, purchased from the Deep Rock 80,000 shares of perferred stock at $90.00 per

share. These 80,000 shares added to the 11,969 shares Standard owned according to its annual reports for 1923, 1924 and 1925, made 91,969 shares or $9,196,900.00. (R. Vol. 2, p. 129)

1926.

Standard's annual report for the year ending December 31, 1926, page 21, states that Standard owned 91,969 shares of preferred and 158,000 shares of common, and that the public owned 48,031 shares of preferred and 10,464 shares of common. (Also see Knourek's answer to the 5th interrogatory, R. Vol. 2, p. 112.) This makes a total of 140,000 shares of outstanding preferred, and a total of 168,464 shares of outstanding common. This is verified by the Deep Rock's annual report for the year ending December 31, 1926, published on page 52 of Standard's annual report for the year ending December 31, 1926.

1927.

Standard's annual report for the year ending December 31, 1927, page 50, shows Deep Rock's annual report for the year ending December 31, 1927, and that there was outstanding 140,000 shares of preferred and 177,552 shares of common stock. Standard's annual report for the year ending December 31, 1927, page 22, shows that of Deep Rock's 140,000 shares of preferred stock, Standard owned 91,969 shares and the public owned 48,031 shares, and of the 177,552 shares of common stock outstanding, Standard owned 158,000 shares and other persons owned 19,552 shares.

1928.

Standard's annual report for the year ending December 31, 1928, page 48, shows Deep Rock's annual report for the year ending December 31, 1928, which states that there was outstanding 50,000 shares of convertible preferred stock and 580,000 shares of common stock, all without par value, and valued at $24,100,971.40. Standard's annual report for

the year ending December 31, 1928, page 23, shows that Deep Rock's total outstanding preferred stock was 50,000 shares, of which Standard owned 1,969 shares and the public owned 48,031 shares, and that there was outstanding 589,000 shares of common stock, of which Standard owned 569,448 shares and the public owned 19,552 shares. This situation was brought about by an amendment of the Deep Rock's charter in April, 1928, which provides for a total issue of 1,450,000 shares without par vaule, of which 450,000 were preferred and 1,000,000 common. According to Knourek's answer to the 5th interrogatory the Standard, on April 12, 1928, surrendered 90,000 shares of preferred stock in exchange for 180,000 shares of common stock, thus leaving only 50,000 shares of preferred outstanding.

1929.

Standard's annual report for the year ending December 31, 1929, page 46, shows 50,000 shares of convertible preferred and 580,250 shares of common stock, all without par value, and valued at $24,101,221.40. Of this stock, as shown by Standard's annual report for the year ending December 31, 1929, page 22, Standard owned *969* shares and the public owned 49,031 shares, and of the 580,250 shares of common stock Standard owned 560,448 shares and other persons (mostly officers and employees of the Standard and Deep Rock) owned 19,802 shares. Standard sold 1000 preferred February, 1929, for $99,027.78. (R. Vol. 2, p. 114)

1930.

Standard's anual report for the year ending December 31, 1930, page 46, shows Deep Rock's annual statement for the year ending December 31, 1930, which shows outstanding 50,000 shares of convertible preferred sotck and 599,475 shares of common stock, all without par value, and valued at $25,110,533.90. Standard's annual report for the year ending December 31, 1930, page 23, shows Deep Rock's total

outstanding preferred was 50,000 shares, of which Standard owned 969 shares and the public owned 49,031 shares, and that the Deep Rock's total outstanding common stock was 599,475 shares, of which Standard owned 579,132 shares and other persons owned 20,343 shares.

1931.

Standard's annual report for the year ending December 31, 1931, page 46, shows Deep Rock's annual statement for the year ending December 31, 1931, stating that its total outstanding stock issue was 50,000 shares of preferred and 599,475 shares of common, of no par value, valued at $25,110,533.90. Standard's annual report for the year ending December 31, 1931, page 23, also shows that Deep Rock's total outstanding preferred was 50,000 shares of which Standard owned 969 shares and the public owned 49,031 shares, and that the total outstanding common stock was 599,845 shares, of which Standard owned 579,132 shares and other persons owned 20,713 shares.

1932.

Standard's annual report for the year ending December 31, 1932, fails to contain Deep Rock's annual report for that year, but states on page 15, that the Deep Rock was in receivership and that the Standard owned 969 shares of its preferred stock and 579,132 shares of its common stock, and on page 7 recites that the Deep Rock is in receivership, is indebted to the Standard on its open account in the sum of $9,342,642.37 against which certain counterclaims have been asserted, and that Standard owned 969 shares of Deep Rock's preferred stock and "579,132 (96.60 per cent of the total outstanding) shares of its common stock."

Thus it appears at all times since Shaffer and his associates were eliminated in 1921 Standard has owned such an enormous majority of the common stock that the voting power of the preferred stock, if at any time vested by nonpayment of dividends, would have been wholly insufficient

to take away from the Standard complete actual control of the Deep Rock.

Standard's claim for unpaid 7 per cent compound interest should be disallowed on the entire amount of the Management Corporation's supervision fee and interest on other items in Standard's claim should be reduced to the rate of 5 per cent per annum and then subordinated to the claims of the other creditors. In other words, Standard's claim if allowed for any amount should be subordinated to the claims of all the other creditors.

There is no escape from the conclusion that the lease executed in March, 1926, as of October 1, 1925, and the renewal thereof were conceived in sin and born in iniquity: It would be a gross fraud upon creditors, especially the $10,000,000.00 note holders, to permit the Standard to share on its account for rentals on an equal basis with them in the distribution of the assets of the Deep Rock.

As heretofore pointed out, the prospectus upon which the $10,000,000.00 notes were sold, although promulgated two years and six months after the October 1, 1925 lease, expressly represented to the public and prospective purchasers of the notes that the Deep Rock owned the cracking plant, and concealed the Refining Company's claim of title to the Bradstreet properties and additions and concealed the large indebtedness of the Deep Rock to the Standard.

If the lease of October 1, 1925, and its renewal of October 1, 1930, are sustained, then every sense of right demands that the Standard's claim for unpaid rentals, Management supervision fees, and all claims since the *24th* day of *February,* 1928 (cut-off date between the Standard's open account satisfied by the issuance of 222,448 shares of Deep Rock stock in satisfaction of Standard's open account up to that date), should be disallowed or subordinated to the claims of the $10,000,000.00 note holders, as no reasonable

man can read the prospectus upon which the notes were sold without concluding that the Deep Rock owned the cracking plant, etc.

Standard instigated the issuance and sale of the $10,000,000.00 notes and it can not be heard to claim that it had no notice of the representations contained in the prospectus and Mr. O'Brien's letter printed as a part thereof. Any conclusion to the contrary would be absurd. That the Standard was chargeable with notice is clearly sustained in *Investors' Finance Co.* v. *Bodnar,* 87 Colo. 498, 289 Pac. 599, quoted on page 397 of this abstract and brief.

Also, as heretofore pointed out, the Standard was greatly interested in the issuance and sale of Deep Rock's $10,000,000.00 March 1, 1928 notes. It, and not the Deep Rock, received the proceeds of the sale of the notes. The Standard, and not the Deep Rock, used the proceeds of the notes to pay Deep Rock's indebtedness. (See tenth item of credit column in Standard's Exhibit "A" to its claim; R. Vol. 1, p. 63.) Standard had guaranteed the Deep Rock's first mortgage bonds in the sum of $10,000,000.00 of which $1,843,700.00 with interest was outstanding at the time the $10,000,000.00 March 1, 1928 notes were issued and sold. (See Standard's 1927 Annual Report, note bottom of page 13, and its 1926 Annual Report, bottom of page 11.) The 11th item on page 1 of Exhibit "A" to Standard's claim shows it paid the balance of the first mortgage notes in 1928, principal and interest, etc., in the sum of $1,922,110.23. In fact it is clear from the evidence that the Standard so managed the business and affairs of the Deep Rock as to make the Deep Rock its mere adjunct and instrumentality. The Deep Rock was Standard's agent in the production and refining of oils.

The following facts disclosed by the record conclusively prove that the Standard, quoting the words of Mr. Chief

Justice WHITE in *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 55 L. ed. 458, *"so used the power thus resulting from its stock ownership as to deprive the" Deep Rock "of all real, independent existence, and to make it virtually but an agency or dependency or department of the" Standard, to-wit:* (NOTE: Standard's counsel will not dispute the following 39 acts of Standard:)

(1) Mr. O'Brien testified in regard to the acquisition of the properties from C. B. Shaffer in 1919 that "the utility business was suffering greatly at that time by the greatly increasing cost brought about by the war. Earnings of the Standard Gas & Electric Company had shrunk very considerably, and we were looking for something that might improve that condition." "We were suffering greatly by the high cost brought about by the war and were looking around for something to help us out. So we got into the oil business that way." (R. Vol. 2, p. 4)

(2) As shown by Knourek's answer to the 21st interrogatory, Exhibit "C" to his answer to the 27th interrogatory and his answer to the 64th interrogatory, the Standard treated the Deep Rock's debts and accounts as its, Standard's, debts and accounts, and in dealing with third persons either directly or through its agency, the Engineering and Management Corporation, Standard treated Deep Rock, for all practical purposes, as one of its departments and agencies. Thus Standard paid $2500.00 for Deep Rock's filing fee in Texas in 1929. (Knourek's answer to the 21st interrogatory.)

(3) R. J. Graf, Standard's Secretary and Treasurer from 1919 to 1923, inclusive, and Standard's Director from 1912 to 1933, inclusive, and its First Vice-President from 1924 to 1932, inclusive, and Engineering and Management Corporation's Vice-President from 1920 to 1923, inclusive and its First Vice-President from 1924 to 1932, inclusive

(see Exhibits 12 and 14 to "Stipulation"), and connected with Standard since its organization, testified as follows (Tr. 130-131):

Q. "So far as your knowledge goes, from and after the time the Standard acquired Mr. Shaffer's stock, and required him and the directors he named to resign as officers of the Shaffer Oil and Refining Company, the Shaffer Oil and Refining Company adopted no policy, made no contracts, without the direction of the Standard Gas and Electric Company?

A. Without consulting with the officers of the company.

Q. And obtaining the approval of the officers of the Standard Gas and Electric Company. That is correct, is it?

A. Well, there may have been certain policies that were adopted, both in merchandising, operating, and construction down there that were reported to us afterwards, the responsibility for which had been taken by the Shaffer Oil and Refining Company.

Q. Well, now, name one thing which Shaffer Oil and Refining Company did after Shaffer and his directors resigned that was not directed or approved before it was accomplished by the directors of the Standard Gas and Electric Company.

A. Some marketing policies.

Q. What kind of policies?

A. Prices of products that were sold; attitudes towards the controlling dominant factors in the middle west section of this country.

Q. You mean in the distributing department?

A. Yes, sir."

(4) According to Exhibit "C" to Knourek's answer to the 27th interrogatory, Standard paid Deep Rock's office rent in Chicago from time to time. (R. Vol. 3, pp. 27 to 40)

(5) Standard, from time to time, paid the fees of Deep Rock's Directors. (R. Vol. 2, pp. 136, 155 and Exhibit "C", R. Vol. 3, p. 27.)

(6) Standard also paid the Deep Rock's telephone and electric light service. (Tr. 603)

(7) Standard, through the Engineering and Management Corporation, made purchases of supplies, etc., for Deep Rock totaling $1,119,713.00. (Tr. 233)

(8) Standard paid to Corporation Trust Company the statutory representation service fees in Delaware for the Deep Rock. (Tr. 536 and 366)

(9) As shown by the 2nd item in Exhibit "A" to Standard's claim, Standard paid the interest on Deep Rock's First Mortgage indebtedness for the years 1924, 1925, 1926 and 1927. (Tr. 608)

(10) As shown by the 2nd item of charges in Exhibit "A" to Standard's claim, Standard paid the annual $600,000.00 interest on Deep Rock's March 1, 1928, $10,000,000.00 note issue, now outstanding, for the years 1929, 1930 and 1931.

(11) Standard paid dividends on Deep Rock's stock to stockholders other than Standard and charged them to Deep Rock. (R. Vol. 2, pp. 96-97)

(12) Standard paid Deep Rock's debts from time to time without apparently consulting Deep Rock. (Tr. 260, 346, 349, 355, 412 and 416)

(13) Standard deposited and paid the sum of $3,886,666.82 as Deep Rock's sinking fund requirements on its first mortgage bonds and charged the same to Deep Rock without any apparent authority from the Deep Rock. (Tr. 344 etc., and see also 3rd item in debit column of Exhibit "A" to Standard's claim.)

(14) Standard paid interest on Deep Rock's funded debts without any apparent authority from the Deep Rock and charged the same to Deep Rock. (Tr. 340)

(15) Standard purchased Blue Ridge Oil and Gas Company stock without any apparent authority from the Deep Rock and charged same to Deep Rock's account. Standard owned all the outstanding stock of the Blue Ridge Oil and Gas Company and apparently purchased the stock from itself. It does not appear that the officers or directors of the Deep Rock were consulted. (Tr. 418-419)

(16) Standard, directly and also through the Engineering and Management Corporation, employed counsel and attorneys for Deep Rock without any apparent authority from the Deep Rock, and paid their fees and charged the same to Deep Rock. (Tr. 550)

(17) Standard paid Federal Government normal tax on Deep Rock's bonds (Tr. 366) and Federal Government Refining Company income taxes for the year 1925 ($29,-565.91), and for 1926 and 1927 ($162,000.00). (See Item 9 of Exhibit "A" to Standard's claim and Knourek's answer to the 21st interrogatory.)

(18) Standard, through the Management Corporation, charged Deep Rock, without any authority of Deep Rock's Board of Directors, with a portion of the salaries of the Engineering and Management Corporation's officers.

(19) Standard's officers, acting as Deep Rock officers in executing Deep Rock's promissory notes and other contracts in its name, were clearly acting under the directions of Standard. (See testimony of List, R. Vol. 2, p. 158; Lehmkuhl, R. Vol. 2, p. 144; Pohl, R. Vol. 2, p. 145; and McKay and Madden, R. Vol. 2, p. 151.)

(20) Standard paid H. M. Byllesby and Company $143,425.00 for services in procuring the extension of the $10,000,000.00 in notes. This was done without any authority from the officers or directors of the Deep Rock. (Tr. 365)

(21) Standard paid Continental and Commercial Safe

Deposit Company rental on Deep Rock's safety deposit box paid for services of Deep Rock's transfer agent, services of Deep Rock's registrar, trustees' services, and refunds of state taxes under other bond and note issues, and for services of the Corporation Trust Company. (Tr. 366) This does not appear to have been by the authority of the officers or directors of the Deep Rock.

(22) Standard purchased supplies, some from Wheeling Steel Corporation, for Deep Rock, paid for the same and charged the same to Deep Rock, without any apparent authority from the Deep Rock's officers or Board of Directors, and purchased pipe and made other purchases for the Deep Rock, which Standard paid and charged to the Deep Rock. (Tr. 370-371)

(23) Standard's officers, acting as Deep Rock's officers, drew checks on Deep Rock's bank accounts. (Tr. 17 and 375; and Exhibit "A" to Knourek's answer to the 12th interrogatory.) And some of these checks were payable to Standard. (Exhibit 11 to Francisco's answer to the 40th interrogatory.)

(24) Standard's officers, acting as Deep Rock's officers, executed many notes for Deep Rock as payor, some of which were payable to Standard.

(25) The $7,500,000.00 Two-Year 6% Gold Notes of Deep Rock, dated April 15, 1926, due April 15, 1928, were authorized at a meeting of the Deep Rock's Board of Directors on April 27, 1926, at which meeting there were only 9 out of 16 directors present, all those present being at the time Standard directors. (See minutes of Deep Rock's meeting of the Board of Directors of April 27, 1926.)

(26) Standard's directors, acting as Deep Rock's directors at the meeting on April 27, 1926, authorized a written contract with H. M. Byllesby and Company, Janney

Company, and Federal Securities Corporation for the underwriting and sale of said notes to the public. The proceeds of said sale amounted to $7,273,750.00, which Standard received and appropriated to itself as a credit on its open account against the Deep Rock. (See Item 16, page 3, Exhibit "A" to Standard's claim, and R. Vol. 2, p. 181.)

(27) The Management Corporation wholly owned by Standard, charged Deep Rock with a part of the salary of its, the Management Corporation's, officers, which Standard paid or assumed and charged to Deep Rock on open account. Lynch, an officer of the Management Corporation, was likewise a director and First Vice-President of the Standard, and yet a part of his salary as an officer of the Management Corporation was charged by Standard to Deep Rock. These payments ran into several thousand dollars. (Tr. 407, 408, 409, 410, 411, 412)

(28) Standard purchased from H. M. Byllesby and Company 11,000 shares of Utility Industrial Corporation stock for $277,475.00 in 1929 and charged the same to Deep Rock. (12th item in Exhibit "A" to Standard's claim, R. Vol. 1, p. 61.) This does not appear to have been by the authority of the officer or directors of Deep Rock.

(29) Deep Rock's Directors' meetings were held in Chicago in Mr. O'Brien's office occupied by him as President of the Standard. (Tr. 51, 113, 117, 129, 171)

(30) Nine or ten of Deep Rock's fifteen directors were also Standard directors who resided in Chicago, and other Deep Rock directors were mere dummies.

(31) Deep Rock's minute books of its directors and stockholders' meetings were kept in Chicago. (Tr. 186)

(32) The Standard's organization in Chicago kept in daily touch "with all the affairs of the Shaffer Oil and Refining Company as they affected the financial and accounting department." (Tr. 273-274)

(33) Once a month Deep Rock's officers went to Chicago for conferences with officials of the Management Corporation, who were likewise officials of the Standard (Tr. 274), and the Standard's office kept in as close touch with Francisco after he went to the Tulsa office as it was in touch with him while he was in Chicago as a Deep Rock employee. (Tr. 274)

(34) The Gray Committee, composed of John L. Gray, Riddle, Francisco, Moody, Huey, Majewski, and sometimes Dade, had monthly, or more often, conferences in Chicago with Standard officials. (Tr. 81 and 97)

(35) The Deep Rock's officials did nothing of any importance without first consulting and obtaining the approval of the Standard officials. (R. Vol. 2, p. 6)

(36) The Deep Rock forwarded to the Standard officials in Chicago daily and monthly reports. (Tr. 312)

(37) The abject subserviency of the Deep Rock and the helpless vassalage of its officers is forcefully illustrated by their immediate and unprotesting obedience to Standard's General Auditor's command to execute in March, 1926, as of October 1, 1925, the inequitable and unconscionable five-year lease from the Refining Company, and they did so without any inquiry as to the General Auditor's authority to direct the execution of the lease and without any inquiry or knowledge as to whether the rentals were fair or the terms of the lease were equitable. *They were mere automatons.* This lease was executed and Deep Rock's accounts reversed and the book entries made *nunc pro tunc* on the direction of Standard's *"General Auditor"* (Trustee's Exhibit "Eye," R. Vol. 2, p. 606) so as to make it appear that the Refining Company owned the Bradstreet properties and cracking plant. Ever since C. B. Shaffer and associates got out of the Deep Rock in 1921 its officers and directors have been mere Standard marionettes. Standard used its power

to control to the full extent of exercising complete dominion over Deep Rock's properties, its contracts, business and policies.

(38) Not only Standard's directors, acting as Deep Rock directors at the Deep Rock's directors' meeting on April 27, 1926, authorized the issuance and sale of the $7,500,000.00 two-year 6% notes due April 15, 1928, but eight of the nine Deep Rock directors present at the directors' meeting on March 9, 1928, authorizing the issuance and sale of the $10,000,000.00 in notes dated March 1, 1928, were also officers and directors of the Standard and the Standard, *not the Deep Rock, received* the proceeds of the sale of the $10,000,000.00 notes and applied the same in payment of Deep Rock's debts to creditors other than Standard.

(39) The *strongest circumstances* showing Deep Rock was a mere department of Standard and that Standard was investing its money in its own business and not merely loaning it to Deep Rock, are these:

(a) Standard caused the issuance and sale of Deep Rock's $7,500,000.00 two-year notes executed April 15, 1926, took the proceeds itself, and had issued to itself 80,000 shares of Deep Rock's preferred stock at $90.00 per share, none of which Standard then paid in cash, but in lieu thereof credited Deep Rock's open account therewith (Knourek's answer to the 66th and 100th interrogatories).

(b) Thereafter, and on December 31, 1926, Standard had its own officers, acting as Deep Rock officers, execute to it, Standard, as payee, Deep Rock's five-year 6 per cent note for $4,250,000.00, due December 31, 1931, for which Standard credited Deep Rock with $4,080,000.00 on its open account, which overpaid the open account and left a balance in Deep Rock's favor in the sum of $2,331,325.53. (Knourek's answer to the 45th interrogatory, and Tr. 567.)

(c) Thereafter and on or about April 12, 1928, Standard had Deep Rock issue to it, Standard, 222,448 shares of its common stock in satisfaction of Standard's open account balance as of February 24, 1928. (See last page of Knourek's answer to the 64th interrogatory.)

Although ownership of all, or the controlling interest of the stock in a subsidiary company does not make the subsidiary an instrumentality of the parent corporation, nevertheless where the parent corporation uses its power in such a way as to completely dominate the subsidiary and deprive it of all independence, it thereby makes the subsidiary its adjunct and instrumentality.

Although most of the time five of the Deep Rock's directors were not directors of the Standard, they were mere dummy directors and wholly controlled and owned body and soul by the Standard, as heretofore pointed out on numerous pages in this abstract and brief.

As said by Powell on Parent and Subsidiary Corporations, page 17:

> "The instrumentality rule cannot be circumvented by equipping the subsidiary with directors or officers who are ostensibly, but not actually, independent of the parent corporation. If, in fact, they took their orders from the parent corporation or someone who controlled it, and acted in the interest of the parent corporation rather than the subsidiary, the record names and formal set-up will not avail. The result is the same where the same persons are directors of both corporations, but act in the interest of the parent corporation.
>
> "Direct proof of this affirmative subserviency of the subsidiary's officers is conclusive of the case against the parent corporation, in so far as the instrumentality rule is concerned. But such direct proof is not often forthcoming. Usually this subserviency is an ultimate fact to be deduced from all the facts of the case and the other elements previously discussed indicate the circumstances which often are available for this purpose."

It is clear that the officers and directors of the Deep Rock were not acting with an eye single to the best interest of the Deep Rock, but were acting at all times in the interest of the Standard.

The directors and executive officers of the Deep Rock did not act independently in the interest of the Deep Rock. They took their orders from the Standard and acted in the Standard's interest. There is no escape from this conclusion. It is impossible to conceive of the Deep Rock's officers acting in the interest of the Deep Rock when they consented to execute the October 1, 1925 lease from the Refining Company at a monthly rental of $75,000.00 for three months in 1925, and $50,000.00 per month for four years and nine months thereafter. After considering the October 1, 1925 lease and observing the results thereof, it is inconceivable to believe that the Deep Rock's directors and executives acted in the interest of the Deep Rock in renewing said lease on October 1, 1930, for another 5-year period at $50,000.00 a month rental, especially in veiw of Deep Rock's losses under the first lease. It is inconceivable that the Deep Rock's directors and executives, if they really had anything to do with it, acted in the interest of the Deep Rock in permitting the Standard to pay over $1,300,000.00 or pretend to pay to the Management Corporation management fees and sundry charges for services the record shows were not worth $75,000.00.

Gray, Executive Vice-President of the Deep Rock, received a salary of $36,000.00 a year from the Deep Rock. He was employed by the Standard as an expert refiner and an expert in the construction, installation and operation of cracking plants and refineries.

Why did Deep Rock's executive officers consent, if they did consent, to the Standard charging it $1,219,034.83 for alleged management services of the Management Corporation,

a wholly owned Standard subsidiary whose officers and directors were Standard officers and directors, with O'Brien president and dominating director of all three corporations? The claim is perfectly ridiculous in view of the fact that it is principally for the advice of the Management Corporation's officers advising themselves as Standard officers to loan money to or finance certain projects of the Deep Rock, likewise officered by the same men.

The evidence shows that the officers of the Deep Rock never entered into a transaction of the slightest importance without first consulting the officers of the Standard and obtaining their direction to go ahead. Certainly it can not be said that the Deep Rock's officers were acting in the interest of the Deep Rock by acquiescing to compound interest at the rate of 7 per cent, calculated on daily balances, and in addition paying hundreds and hundreds of thousands of dollars to Standard through its corporate *conduit*, the Management Corporation for the advice of men, inexperienced in the oil producing and refining business—the same men playing the absurd rolls of Management Corporation officials, advising themselves as Standard officials to loan to their child, Deep Rock, money or confer with and advise themselves what to do as Deep Rock officers. Here the comment of I. Maurice Wormser, in 12 Columbia Law Review, page 50, is particularly apropos, for he said, in commenting on a situation of this kind, *"It is the same pack of thievish wolves, whether in the 'entity' garments of Little Red Riding Hood's grandmother or in their own furry coats."*

As said in *United States* v. *Reading Co.*, 253 U. S. 62-63, 64 L. ed. 781:

> "* * * yet, where such ownership of stock is resorted to, *not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or depart-*

ment of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require."

In *Platt* v. *Bradner Co.*, 131 Wash. 573, 230 Pac. 635, the court said:

"It is also well-settled law that, while in general, a corporation is a separate legal entity, nevertheless when one corporation so dominates and controls another as to make that other a simple instrumentality or adjunct to it, the courts will look beyond the legal fiction of distinct corporate existence, as the interests of *justice require;* and where stock ownership is resorted to not for the purpose of participating in the affairs of the corporation in the customary and usual manner, but for the purpose of controlling the subsidiary company so that it may be used as a mere agency or instrumentality of the owning company, the court will not permit itself to be blinded by mere corporate form, but will, in a proper case, disregard corporate entity, and treat the two corporations as one." (Citing long list of cases.)

In *Wenban Estate* v. *Hewlett*, 193 Cal. 675, 227 Pac. 723-732, the court said:

"True, there is no showing or claim of fraud in the instant case on the part of Caroline S. Wenban or the corporation plaintiff. Still, as previously indicated, *it is not necessary that actual fraud be shown.* It is sufficient if a refusal to recognize the fact of the identity of the corporate existence with that of the individual would bring about inequitable results. All of the facts and circumstances surrounding the inception of and attending the controversy in suit bring the case clearly within the two requirements declared in *Minifie* v. *Rowley, supra,* to be sufficient to constitute the cause of action stated in the cross-complaints of the several appellants.

"Although in the instant case it is the corporation

> which is seeking to have the bonds annulled, such relief, if effected, would obviously be for the benefit of Caroline S. Wenban as sole shareholder. As was said in *Home Fire Ins. Co.* v. *Barber*, 67 Neb. 644, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. Rep. 716, where a corporation 'is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover'."

In *Advance-Rumely Thresher Co.* v. *Geyer*, 40 N. D. 18, 168 N. W. 731, 733, the court, discussing this question, said:

> "If it is a fact that the stockholders and *directors* of the M. Rumely Company and the Rumely Products Company *are entirely separate and distinct*, this fact alone, *so far as the public is concerned*, does not make them absolutely independent concerns if the results and whole compass for their work and the effect of the organizations is to accomplish *one purpose*."

The above case was cited and approved in *Caldwell* v. *Roach*, 44 Wyo. 319, 12 P. (2d) 376.

The most recent case on the subject of subordinating the parent company's claim to the superior rights of other creditors is the opinion of Judge COCHRAN in *In re Kentucky Wagon Mfg. Co.*, 3 Fed. Supp. 958. Judge COCHRAN went into the authorities at great length and held that inasmuch as the subsidiary company was conducted as agent of the parent company, the parent company's claims as a creditor must be postponed until all the other creditors have been paid. That was a bankruptcy case in which the trustee in bankruptcy resisted the claim of the receivers of the parent corporation. Judge COCHRAN said:

"The main position of the trustee, who is resisting the claim of the receiver, which alone will be considered, may be taken to be, not that it is not a valid claim against the bankrupt, but that its payment should be postponed to the payment of its other indebtedness which means that nothing can be paid on it. This position is based on the relation between the National Bank of Kentucky with whom the claim originated and the bankrupt. His claim as to such relation may be put thus: It was a relation of principal and agent, the bank being the principal and the bankrupt the agent. The bankrupt held its property and carried on its business not on its own account *but on account of the bank. If such was the case there can be no question but that the payment of the receiver's claim should be postponed to the payment of the other indebtedness. Where such a relation exists between two corporations the principal is the dominant corporation and the agent the subordinate.* Cases involving the question whether such a relation existed between two corporations has arisen are very numerous in the books. That such relation existed has been held in the following federal decisions, to-wit: *Interstate Tel. Co.* v. *B. & O. Tel. Co.*, (C. C.) 51 F. 49; *Glidden & Joy V. Co.* v. *Interstate Nat. Bank*, (C. C. A.) 69 F. 912; *Am. Nat. Bank* v. *Nat. Wall Paper Co.*, (C. C. A.) 77 F. 85; *Cockrill* v. *Abeles*, (C. C. A.) 86 F. 505; *Wallerstein* v. *Ervin*, (C. C. A.) 112 F. 124, 126; *Lehigh Valley R. Co.* v. *Dupont*, (C. C. A.) 128 F. 840; *In re Muncie Pulp Co.*, (C. C. A.) 139 F. 546; *In re Rieger, Kapner & Altmark*, (D. C.) 157 F. 609; *Colonial Trust Co.* v. *Montella Brick Works*, (C. C. A.) 172 F. 310; *Clerc Clothing Co.* v. *Union T. & Savings B. Co.*, (C. C. A.) 224 F. 363; *Chicago Mill & Lumber Co.* v. *Boatmen's Bank*, (C. C. A.) 234 F. 41; *Baker Motor Vehicle Co.* v. *Hunter*, (C. C. A.) 238 F. 894, 899; *New York Trust Co.* v. *Carpenter*, (C. C. A.) 250 F. 668; *The Willem Van Driel Sr.*, (C. C. A.) 252 F. 35; *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, (C. C. A.) 267 F. 676; *Portsmouth, etc., Corp.* v. *Fourth Nat. Bank*, (D. C.) 280 F. 879; *Fourth Nat. Bank* v. *Portsmouth, etc.*,

Corp., (C. C. A.) 284 F. 718; *Wabash Ry. Co.* v. *Am. Ref. T. Co.*, (C. C. A.) 7 F. (2d) 335; *In re Marcella Cotton Mills*, (D. C.) 8 F. (2d) 522; *Bishop* v. *United States*, (C. C. A.) 16 F. (2d) 410; *Costan* v. *Manilla Electric Co.*, (C. C. A.) 24 F. (2d) 383; *Industrial R. Corp.* v. *General Motors Corp.*, (D. C.) 29 F. (2d) 623; *Kimberly Coal Co.* v. *Douglas*, (C. C. A.) 45 F. (2d) 25; *N. Y. T. Co.* v. *Island Oil & T. Corp.*, (C. C. A.) 56 F. (2d) 581; *Central R. Bank & T. Co.* v. *Caldwell*, (C. C. A.) 58 F. (2d) 721; *United States* v. *Lehigh Valley R. Co.*, 220 U. S. 257, 31 S. Ct. 387, 55 L. ed. 458; *United States* v. *Delaware, L. & W. R. Co.*, 238 U. S. 516, 35 S. Ct. 873, 59 L. ed. 1438; *C., M. & St. P. Ry. Co.* v. *Minneapolis C. & C. Ass'n*, 247 U. S. 490, 38 S. Ct. 553, 62 L. ed. 1229; *United States* v. *Reading Co.*, 253 U. S. 26, 40 S. Ct. 425, 434, 64 L. ed. 760.

"In such cases the dominant corporation is often termed the *parent and the subordinate its subsidiary*. The latter is referred to as an instrumentality of the former or as an adjunct to it. Sometimes it is said that the dominant corporation owns the subordinate corporation or that the two corporations are one or that they are practically identical. Further it is not infrequently said that the court should look through or beyond the fiction of the corporate entity of the subordinate corporation as an unreality or that its distinct corporate existence or its legal entity should be disregarded. It is characterized as a 'dummy.' In the case of *Kimberly Coal Co.* v. *Douglas*, (C. C. A.) 45 F. (2d) 25, 27, the matter was thus put: 'The independent entity of the two companies is so far disregarded that each is considered a part of the indivisible whole.' *It seems to me that none of these ways of putting the matter is strictly accurate.* I do not see how one corporation can own another corporation. Each is a distinct person, in the eye of the law, and one person cannot own another person. Nor can two corporations be one corporation any more than two natural persons can be one natural person, nor can two corporations be merged into one corporation any more than two natural persons be

merged into one natural person. There can be no identity between two corporations any more than between two natural persons. Of course, two corporations can be merged or consolidated into one corporation by statutory authority, but not otherwise can two corporations become one corporation. Nor should the distinct corporate existence or legal entity of the subordinate corporation be treated as an unreality or disregarded. As I see it, there is no indivisible whole in such a case. Of course, where such a relation exists the case may be disposed of as if the subordinate corporation had no existence and its property and business were held and carried on by the dominant corporation. But in so disposing of it the subordinate corporation is not regarded as having no distinct corporate existence or as not being a legal entity. It does have such existence and is such an entity. As said in the case of *United States* v. *Reading Co., supra,* the court deals with the case as if the corporate agency did not exist. It is the same as in the case of a relation of principal and agent between two natural persons. The existence of the agent may be ignored and the case disposed of as if the property and business owned and carried on by the agent were the property and business of the principal. *But there is no necessity and it is not helpful to so dispose of the case.* The distinct and independent corporation existence of the subordinate corporation as well as of the dominant corporation should be fully recognized. *Such recognition does not prevent the relation of principal and agent existing between them.* There is no reason why one corporation may not be the agent of another. Possibly there may be some question as to whether a corporation authorized to do a certain business may do that business on account of another, but this does not render it so that one corporation may not, in fact, be the agent of another corporation.

"We come then to the question as to whether the relation of principal and agent did in fact exist between the bank and the bankrupt. What is the test of the existence thereof? *It is not that the one corporation brought*

about the incorporation of the other—that the one own all the capital stock of the other and that the director of the two corporations are the same. All of these things may exist and yet such relation not exist. In the case of *United States* v. *Reading Company, supra,* it was said that 'the ownership by a railroad company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two' and that it does not create such identity where the ownership thereof is 'for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders.' This principle was applied in the following cases, to-wit: *Fitzgerald* v. *Mo. Pac. Ry. Co.* (C. C.) 45 F. 812; *Central Trust Co. of New York* v. *Bridges,* (C. C. A.) 57 F. 753; *Richmond & I. Const. Co.* v. *R. N., I. & B. R. Co.,* (C. C. A.) 68 F. 105, 108, 34 L. R. A. 625; *Watson* v. *Bonfils,* (C. C. A.) 116 F. 157; *C. Crane & Co.* v. *Fry,* (C. C. A.) 126 F. 278; *In re Watertown Paper Company,* (C. C. A.) 169 F. 253, 255; *Pittsburgh & B. Co.* v. *Duncan,* (C. C. A.) 232 F. 584; *Peckett* v. *Wood,* (C. C. A.) 234 F. 833, 838; *Majestic Co.* v. *Orpheum Circuit,* (C. C. A.) 21 F. (2d) 720; *Am. Cyanamid Co.* v. *Wilson & T. F. Co.,* (C. C. A.) 51 F. (2d) 665.

"In the case of *Richmond & I. Const. Co.* v. *R. N. I. & B. R. Co.,* it was said: 'The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock nor through the identity of stockholders, operate to make either the agent of the other or to merge the two corporations.'

"*The test, as I conceive it, is whether the one corporation controls the action of the other.* Is the latter subordinate to the former, and does the former dominate the latter? The corporation, which is the principal, is

frequently termed the controlling corporation. The fact that it may have brought about the existence of the other corporation, that it owns all its capital stock, and that the directors of both corporations are the same or substantially so, though they do not of themselves bring about the relation of principal and agent between the two, *help other circumstances to establish the existence thereof*. The facts of a case may make it difficult to determine whether such control and consequent relation exist. It is to be noted that it is not 'controlling influence' that is essential. It is *actual control* of the action of the subordinate corporation.

"The claimant urges another test as to whether such relation exists between two corporations. It is whether the one corporation is liable for all the debts of the other. If it is not then such relation does not exist. If it is the relation exists. Possibly he means no more than that such is the test not of whether the relation exists, but, assuming it to exist, of whether the principal's debt should be postponed to the other debts. But it is not clear that he so means that it is immaterial which way it is to be regarded. In his preliminary index to his brief, he says: 'The claim may not be rejected unless the bank was liable for all the debts of the Wagon Company.' In the body thereof he says: 'The only principal which would justify the negation of the Bank's claim is one which would at the same time permit all the other creditors of the Wagon Company to collect their debts from the bank.' And again: 'There is no legal ground upon which to reject our claim unless upon the same facts the Bank is responsible for all the debts of the Wagon Company.' He terms this a 'basic legal principle' and says that it 'has controlled the application or rejection of the "*alter ego*" doctrine in different circumstances.' * * *

"But it is immaterial whether this is so or not. His contention is not sound. He supports it by quotations from the opinions in certain cases. In the case of *In re Watertown Paper Company supra*, where it held that the relation of principal and agent did not exist be-

tween the creditor corporation and the bankrupt co
poration, it was said: 'Any legal principle which wou
prevent the pulp company (the creditor corporatio
from collecting its claims from the estate of the pap
company (the bankrupt corporation) would permit
the creditors of the paper company to look to the pu
company for payment of their demands—would, in e
fect, extend the jurisdiction of the bankruptcy cou
over the pulp company.'

"In the case of *Peckett* v. *Wood, supra,* where al
such relationship was held not to exist it was said: 'T
only principle, I think, upon which these otherwi
valid claims may be postponed in payment to those
other creditors is one which would at the same time pe
mit the other creditors of the corporation to collect the
claims from R. D. Wood & Co.'

"Claimant states that in the case of *Baker Mot
Vehicle Co.* v. *Hunter, supra,* where such relation w
held to exist it was so held because the principal was li
ble for the debts of the agent. He quotes: 'In such cas
the controlling corporation may be held liable for t
debts of the subordinate company. This court call
attention to this principle *In re Watertown Paper C*
169 F. 252, 94 C. C. A. 528 (1909). In such cases deb
due from the subordinate company to the controlling co
poration, and which that corporation would according
be liable for, are not entitled to be paid *pari passu* wi
the other debts; but the latter are entitled to be fir
paid in full.'

"Undoubtedly where the relation of principal an
agent exists between two corporations not only shou
the debts due the principal from the agent *be pos
poned to the debts of other creditors of the agent,* b
the principal is liable for such debts. Both these pos
tions follow from the same considerations, to-wit, th
existence of such relation between the two. The pri
cipal is always liable for the debts incurred by h
agent. Likewise the principal *cannot participate* in th
distribution of the agent's assets as to the indebtedne

of the agent to him on *an equality* basis with the agent's indebtedness to others. *But it is not true that unless the principal is liable to others for the debts of others he has a right to participate on an equality with such others or putting it otherwise it is only where he is so liable that he has such right.* The cases cited or the statements in the opinions therein relied on do not support such position.

"In the cases of *In re Watertown Paper Co.* and *Peckett* v. *Wood*, it was held that the relation of principal and agent did not exist. Hence no question was involved in either as to the relative rights of a principal and other creditors against the agent. In the statements relied on it was said that if the principal is to be postponed as to the other creditors, it would be liable for their debts. It was not said that if it was not liable to them therefor its debt should not be so postponed. The statements that if its debt is to be postponed to the debts of others, it was liable for their debts, assumed that the principal had power to incur such indebtedness. A case where it had no such power was not in contemplation. On such assumption the statements were sound beyond question. The ground upon which the indebtedness of the principal should be so postponed is the existence between it and the agent of such relation. On the same ground it followed that the principal is liable for the agent's debts to others, if it had power to incur such indebtedness. It could not be otherwise.

"The case of *Baker Motor Vehicle Co.* v. *Hunter*, *supra*, was one where the relation of principal and agent was held to exist. The principal was engaged in the manufacture and sale of electric motor vehicles in Ohio. The agent was engaged in the business of selling such vehicles for it in New York City. That was the business which the principal was authorized to do and of course it was liable for any indebtedness incurred by the agent. There was, therefore, no question in the case as to what would have been the rights of the parties if it had no power to incur such indebtedness. Noth-

ing that was said in the opinion has any bearing whatever on a case involving such contingency.

"Then considering the matter on principle is there anything in the circumstance that the principal is not liable for the debts of the agent, for want of power, to incur such indebtedness, to require that the indebtedness of the agent to the principal should not be *postponed* to the indebtedness due by the agent to others than the principal? This depends on the reason why the indebtedness of the agent to the principal should be so postponed where he is liable for such other indebtedness. A superficial reason therefor is that if it is not so postponed but allowed to participate along with the other creditors in the distribution of the agent's assets it will be found to make up to the other creditors any unpaid balance of their debts after applying their shares of the assets thereto. The other creditors should not be put to this roundabout way of collecting their debts. A short cut to the payment thereof is to deny them any participation in the distribution of the agent's assets until they are paid to the extent thereof. Of course, if those assets are not sufficient, without such participation, to pay their debts in full then they will have to resort to the principal to recover the balance left unpaid. It does not follow from this that they should not receive payment to the full extent of such assets without such participation. Of course, the reason under consideration falls to the ground if the principal is not liable for such other indebtedness for want of power to incur it. *But this reason is not the fundamental reason why the principal should be postponed to the other creditors.* Though the principal may not be liable to them for their debts for want of power to incur them the agent is liable to them therefor. The relation of creditor and debtor exists between them and the agent, just the same as if in incurring the debts he was acting for himself and not for the principal. No such relation exists between the principal and agent except indirectly. The liability of the agent to the principal is on the ground of his accountability to the prin-

cipal for advances made by it to him. It is only upon the settlement of their accounts that it can be said that the agent becomes indebted to the principal. Such being the case, the principal should not be allowed to share in the distribution of the agent's assets to the extent of such liability along with the creditors of the agent *whose debts have been incurred by the agent for and on behalf of and at the instance of the principal.* This should be, no more than if the principal was carrying on the business for itself and not through an agent. it should be allowed to share with its creditors as to what it has put in the business. The liability of the agent to the principal in so far as creditors of the agent are concerned is really a liability of the principal itself.

"A direct authority against the claimant's position is the decision in the case of *Wallerstein* v. *Ervin, supra,* where it was held that where a corporation entered into partnership articles with individuals and contributed to the capital of the firm and shared in its management to the extent of such acts it executed the contract of partnership and became a partner *de facto* and that it could not ignore the status thus created and by asserting that the partnership agreement was *ultra vires,* prove a claim against the firm in bankruptcy in competition with general creditors for advances made or goods sold to the partnership. The court said: 'The trustee did not seek to enforce an *ultra vires* contract, nor to compel the performance of any of its provisions. He simply insisted that a status which had been created by what had actually occurred should not, at the instance of a party to its creation, and to the prejudice of innocent third parties, be utterly ignored, and we think that in sustaining this insistence the court below was clearly right.'

"Thus far I have considered claimant's test as bearing on the question as to whether the *principal* should be postponed to the other creditors in the distribution of the agent's assets. He puts it forward also as a test whether the relation of principal and agent exists between the two corporations. *It cannot have any*

possible bearing on such question. That the bank could not have engaged in the business carried on by the bankrupt and hence was and is not liable for its debts otherwise than as above indicated *has nothing* to do with the question as to whether the relation of principal and agent existed between them. That depends solely on the question *as to how the business was carried on.* That a corporation had no power to do a certain thing does not determine whether it in fact did such thing. It may in fact have done such thing though it had no power to do it.

"I come now to the question as to whether the relation of principal and agent existed between the bank and the bankrupt. It seems to me that it is clear that it did. The bankrupt carried on its business, not on its own account, but on account of the bank. The *bank was dominant and controlling in the operation of its business.* The bankrupt did not act *independently* of the bank but in subordination thereto. The *bank brought about* the incorporation of the bankrupt and paid the expense of it. The incorporation and organization of the bankrupt was regular under the laws of Delaware. Three Delaware citizens were the incorporators. In the articles of incorporation they subscribed for $1,000 of no par capital stock provided for therein; $800 of this was paid by them with money furnished by the bank. They met July 26, 1924, and chose five directors living in Louisville, the number provided for in the by-laws. Neither director owned any stock in the bankrupt. This was not required. *Only one of these five directors* had any official connection with the bank. He was a vice-president thereof. Two were to have charge of the operations of the bankrupt, one of whom, Robert V. Board, became president, and the other became second vice-president and two of them were stockholders in the Continental Car Company, a contract for the purchase of its stock being one of the first things done by the bankrupt after its organization. On the same day, the subscribers executed and delivered an assignment in blank of their shares of stock. This blank was never filled and certificates therefor were never issued. * * *

"It was at the instance and by the direction of the bank that the bankrupt made the purchase of August 8, 1924; that it entered into the contract of August 1, 1924, with the stockholders of the Continental Car Company. So it was that on August 9, 1924, the bankrupt entered into a contract with two Delaware corporations and again in December, 1924, with one Johnson for the sale of the stock of the bankrupt. It advanced on account of those transactions the sum of $7,426.14. Again in 1928 it sent Board and Duffin to Europe for the same purpose, where they remained for five or six months. It advanced the expenses of this jaunt, amounting possibly to as much as $20,000. *During the whole of its business career the policies of the bankrupt were determined by the bank.* The directors regarded that in so acting as such they were representing the bank. It and not the directors determined who should be the officers and fixed the salaries of its officers. * * *

"Such then are the facts which go to make out that the relation between the bank and the bankrupt was that of principal and agent. As against this position the claimant urges that the directors of the bankrupt met frequently and directed its affairs and that the accounts of the bankrupt were kept by it and not by the bank. Such indeed were the facts. Its directors seem to have been quite attentive to its affairs. There were two minute books of their meetings. The last one is missing. The first one covers from the start to August 3, 1926. After the meeting of August 7, 1924, hereinbefore referred to, there was no meeting until March 10, 1925. This would seem to be explained by the fact that the bankrupt and the bank were engaged during this time in a strenuous effort to dispose of the bankrupt's property and business. From March 10, 1925, to August 3, 1926, there were 46 meetings, 28 in 1925, and 18 in 1926. The circumstance that the principal kept the accounts of the agent has been referred to in some of the cases where the relation of principal and agent was held to exist as evidence of that fact. But that here the bank did not keep the books of the bankrupt, they be-

ing kept by it and that the directors were active in looking after the affairs of the bankrupt is not against the relation between the bankrupt and the bank being that of principal and agent. In view of such relation between them one would not expect these matters to have been otherwise. * * *

"There is no escaping the conclusion that the relation of principal and agent did exist between the bank and the bankrupt and that, therefore, the payment of the indebtedness to the claimant as well as to the bank should be postponed until the other creditors are paid which will leave nothing for them."

It will be noted that Judge COCHRAN rejects the contention that the parent company's claim will not be postponed until the other creditors are paid unless it appears that the parent company would, under the circumstances, be liable for the debts of the subsidiary. (Judge COCHRAN's opinion was affirmed by the Sixth Circuit Court of Appeals, 71 F. (2d) 802.)

The United States Circuit Court of Appeals for the Eighth Circuit in *Edward Finch Co.* v. *Robie,* 12 F. (2d) 360, discussed this question and among other things said:

"This court said, in *Wabash Ry. Co.* v. *American Refrigerator Transit Co., et al.,* (C. C. A.) 7 F. (2d) 335, 343: 'If corporations carry on part of their business through subsidiary companies, it makes little difference what such companies may be called; there is no particular divinity surrounding the term "corporation." The courts will look through the form to get at the real intent of the association of individuals or corporations forming the organization, and, if rights of third parties have not intervened, will give effect to the real purpose of the organization in order to promote square dealing and effectuate justice.'

"In *McCaskill Co.* v. *United States,* 216 U. S. 504, 515, 30 S. Ct. 386, 391, 54 L. ed. 590, the court said: 'A growing tendency is therefore exhibited in the courts

to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose.'

"In the *Willem Van Driel, Sr., Case,* 252 F. 35, 39, 164 C. C. A. 147, 151, the court said: 'It would be impossible to imagine a relationship between corporations where the subsidiary corporation was more completely under the control of the dominant corporation. The elevators were constructed and operated merely as a facility to the business of the railroad company. Applying the language of Judge WALLACE in *Lehigh Valley Railroad Co.* v. *Du Pont (Dupont),* 128 F. 840, 64 C. C. A. 478, the potential and ultimate control of all its property and business affairs of the elevator company was lodged in the railroad company, and this control was exercised as completely and as directly as the machinery of corporate organisms would permit. Such *complete dominance and control* by the railroad company made the elevator company its mere puppet.'

"In *Re Rieger, Kapner & Altmark,* (D. C.) 157 F. 609, 613, the court said: 'The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud.'

"From *Anthony, et al.,* v. *American Glucose Co.,* 146 N. Y. 407, 413, 41 N. E. 23, we quote: 'We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth.'

"From 1 Cook on Corporations, (6th ed.) pp. 31 and 32, c. 1, Sec. 6: 'Property acquired by and in the name of a "dummy" corporation may be held to be subject to a mortgage executed by the owner of such "dummy" corporation.'

"Surely the corporate existence here was merely an effort 'to distort or hide the truth.' Bankrupt is in the situation of filing his own claims in a bankruptcy proceeding against his own property."

In this connection it should be borne in mind that the Standard was a mere holding corporation. It had no tangible business—had no tangible property save office furniture. Its only business was drawing dividends from its subsidiaries and loaning them money for which it charged them large fees in the name of the Management Corporation, a wholly owned Standard subsidiary. *From a practical standpoint the Standard was directly engaged in the oil producing and refining business under the name of the Deep Rock as its instrumentality.*

The fact that the Deep Rock had officers and maintained separate books of account and had stockholders' and directors' meetings does not warrant the court in allowing Standard's claim on a parity with other creditors.

In *S. G. V. Co. of Delaware* v. *S. G. V. Co. of Pennsylvania,* 264 Pa. 265, 107 Atl. 721, the Pennsylvania corporation maintained in form its separate corporate entity, but in fact it was so thoroughly controlled and dominated by the Delaware corporation that the Pennsylvania Supreme Court refused to permit the Delaware corporation to establish its claim as a creditor on a parity with other creditors. The court said:

> "The entire business of the Pennsylvania corporation was under the control and management of the Delaware company whose board of directors held monthly meetings in New York for that purpose, at which salaries and prices were fixed, finances arranged and all other necessary business transacted. The directors and officers of the Pennsylvania company were also directors and officers of the Delaware company.
>
> "In the establishment and conduct of the business the latter company furnished about $147,000, for which it took the former company's notes on the basis of loans. These financial transactions were *made on the orders of the directors of the Delaware company,* in which the directors of the Pennsylvania company as

such took no part. To facilitate the business the Delaware company kept a bank account at Reading, but held no meetings in this state, and never engaged in any other enterprise. During the progress of the business debts for merchandise were *contracted in the name of the Pennsylvania company* to the amount of approximately $91,000. The receiver's account showed a balance of some $40,000, to make distribution of which a master was appointed, before whom the S. G. V. Company of Delaware, claiming as creditor, presented its notes for the $147,000, and interest. The master, after an exhaustive consideration, directed distribution of the fund among the merchandise creditors, and rejected the claim above mentioned, on the ground that in reality the business was that of the Delaware company, of which the Pennsylvania company was a mere instrumentality or adjunct. The court below, after careful deliberation, adopted the master's conclusion and ordered distribution accordingly, from which the S. G. V. Company of Delaware, who was plaintiff in the suit where the receiver was appointed and also a claimant, brought this appeal.

"The facts found by the master, as in part outlined above, are supported by the evidence and justify the decree. True, the Pennsylvania corporation continued as a separate entity, notwithstanding the fact that its stock was all held by the Delaware Company (*Point Bridge Co.* v. *Pittsburgh & West End Co.*, 230 Pa. 289, 79 Atl. 567; *Com. Monongahela Bridge Co.*, 216 Pa. 108, 64 Atl. 909, 8 Ann. Cas. 1073; *Monongahela Bridge Co.* v. *Pittsburgh, etc., Traction Co.*, 196 Pa. 25, 46 Atl. 99, 79 Am. St. Rep. 685; 10 Cyc. 1277); but equity looks at the substance of the transaction, and where one corporation conducts its own business through the instrumentality of another and in its name, the *capital invested therein by the former cannot be treated as a loan to the latter as against the rights of third parties.* In other words, one who *invests money in his own business* cannot, in case of failure, shift the loss to innocent parties because of the name under

which the business was done or the manner of doing it. It is well stated by Judge ENDLICH in *Kendall* v. *Klapperthal*, 202 Pa. 596, 607, 52 Atl. 92, 96, affirmed by this court, that equity looks to the substance of the transaction, not to its mere form or color, and while 'a corporation does not lose its legally distinct and separate personality by reason of the ownership of the bulk or the whole of its stock by another, * * * nor by its joining hands with another in a common enterprise, * * * it is well understood that, for purposes of equity, courts will look behind the artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation.' In the present case, the master finds 'that the Delaware corporation did at all times so direct and control the Pennsylvania corporation as to make it merely an instrumentality or adjunct of the former,' and the court below properly concludes that—

> 'When the Delaware corporation put its money into the Pennsylvania corporation, it put it into *its own enterprise*, as owner of the Pennsylvania corporation and business, not into another's enterprise by way of loan as a creditor dealing with a debtor. What it chose to call these supplies of money is of no serious moment. The law pays little heed to the label parties but upon their transactions. *Brunswick* v. *Hoover*, 95 Pa. 508, 513 (40 Am. Rep. 674).'

"Under such circumstances the controlling corporation cannot share as a creditor in the assets of the insolvent subsidiary company. Any other rule would defeat justice and open the door to fraud. This principle is often applied in bankruptcy cases in the federal courts. See *In re Watertown Paper Co.*, 169 Fed. 252, 255, 94 C. C. A. 528; *Colonial Trust Co.* v. *Montello Brick Works*, 172 Fed. 310, 312, 97 C. C. A. 144; *Hunter* v. *Baker Motor Vehicle Co.*, (D. C.) 225 Fed. 1006, 1016, 1017; *Brown* v. *Pennsylvania Canal Co.*, (D. C.) 229 Fed. 444, affirmed in *Pennsylvania Canal Co.* v. *Brown*, 235 Fed. 669, 149 C. C. A. 89; and see, also, *Day* v. *Postal Telegraph Co.*, 66 Md. 354, 7 Atl. 608."

In *Investors' Finance Co.* v. *Bodnar*, 87 Colo. 498, 289 Pac. 599, the court held that the Finance Company, "organized in whole or in part by the officers and stockholders of the Thrift Mercantile Company" for the purpose of assisting the Thrift Mercantile Company in carrying out its business schemes of establishing branch stores throughout the state, was in fact and in law an agency and instrumentality of the Mercantile Company, and that the dominant corporation was chargeable with notice of defenses against a note executed for stock in the subsidiary corporation. The court said:

> "The officers of the Thrift Company and the finance company were not identical throughout, but officers and stockholders of the one company were also officers and stockholders of the other. The two companies had, for a time at least, as conceded by plaintiff's counsel in his briefs, adjoining offices in the same building, with an inside entrance leading from one office to the other. The case is not in its strictest and fullest extent one where all the officers and directors of two companies are the same, an interlocking directorate, but we think the evidence sufficiently discloses that the officers of each of these companies were well advised of the transactions of the other. The same attorney was counsel for both companies throughout their organization, and the same *controlling influence* of the two companies was practically identical."

In *New York Trust Co.* v. *Island Oil & Transport Corporation*, 56 F. (2d) 580, the Second Circuit Court of Appeals said:

> "If a subsidiary is a mere instrumentality and its business is really that of the parent company, a loan by the parent to the subsidiary will be subordinated to the claims of creditors of the subsidiary. *Baker Motor Vehicle Co.* v. *Hunter*, 238 F. 894 (C. C. A. 2); *S. G. V. Co.* v. *S. G. V. Co.*, 264 Pa. 265, 107 A. 721. The reason is that the proprietor of a business cannot lend money

to the enterprise and thus curtail the rights of creditor by sharing *in pari passu* with them, and such loan is re garded as a contribution to the capital of the business.

In *Wabash Ry. Co.* v. *American Refrigerator Trans Co.*, 7 F. (2d) 335-343, the Eighth Circuit of Appeals said

> "If corporations carry on part of their busines through subsidiary companies, it makes little differenc what such companies may be called; there is no particu lar divinity surrounding the term 'corporations.' Th courts will look through the form to get at the real in tent of the association of individuals or corporation forming the organization, and, if rights of third partie have not intervened, will give effect to the real purpos of the organization in order to promote square dealin and effectuate justice."

See opinion of Circuit Judge Woolley, speaking for th Third Circuit Court of Appeals, in *Trustees System Co. o Pennsylvania* v. *Payne*, 65 F. (2d) 103, quoted from a length herein on pages 242 to 246.

In *In re Marcella Cotton Mills*, 8 F. (2d) 522, Distric Judge Clayton of Alabama held that as between creditor and stockholders of an insolvent corporation, the law favor creditors, especially where a stockholder's conduct has con tributed to insolvency, and though stock subscription i rescinded for fraud, the subscriber's claim is subordinate t claims of general creditors.

In *Fourth National Bank* v. *Portsmouth Cotton Oil Re fining Corporation*, 284 Fed. 718, the Fifth Circuit Court o Appeals said:

> "The important question is whether the defendan bank managed, operated and controlled the Montgomer Oil & Feed Company, and the fact that the latter ha a valid corporate existence was wholly immaterial."

Anderson on Limitations of Corporate Entity, Sectio 346, says:

"A holding company owning all of the stock of another corporation except shares sufficient to qualify directors, coupled with control and in fact the management of the subsidiary's business is sufficient to make the parent corporation liable for the conduct of the subsidiary. It is well recognized that stock ownership alone does not render the holding company responsible for the subsidiary company, *but if the holding company uses its ownership of stock in such a manner as to actually control and operate the properties of its subsidiary, that is sufficient to make it responsible.* In other words, the parent company *may not thrust its hand through and from behind the subsidiary corporate entity and as effectively direct its course of conduct as the parent corporation may its own properties and then escape liability for the consequences of its directorship of the subsidiary's property,* by means of bolstering up as a panoply the fictional corporate character of the subsidiary. Neither will the mere matter of bookkeeping result in a determination of the question one way or another, and while consideration will be given to the manner of keeping of the records of the two corporations, it is not controlling, but rather the actual manner of conducting the business controls."

The same authority, section 347, says:

"Upon bankruptcy of a subsidiary corporation, the parent corporation will not be permitted to file its claim in the proceedings and share in the proceeds of its subsidiary before other creditors are paid in full and realization upon its claim must be postponed until the ultimate satisfaction of all other claimants. So where one corporation conducts its business by merely resorting to the instrumentality of another entity, the parent corporation investing therein its capital and reaping the profits of the venture, if successful, it seems to be but fair and just that it should make good the losses if a failure results. So where the officers and stockholders of a corporation organize a subsidiary for the purpose of aiding in the prosecuting of the parent corporation's

business, one will not be permitted to recover upon notes given to the other, and especially this is true where any element of fraud or bad faith has entered into the transaction, and where there are intervening rights of creditors or third parties."

The same authority, Anderson, Section 313, says:

"Unquestionably the mere ownership of stock alone does not make the stockholder responsible for the obligations of the corporation, but it is equally true that where stockownership is not resorted to for the mere matter of investment or for the purpose of participating in the affairs of the corporation as a stockholder only, such ownership of stock is resorted to for the purpose of so *manipulating and controlling a subsidiary corporation in the interest of the parent company,* that such subsidiary becomes a mere agency of the parent company, then, of course, the parent company may not escape liability for the acts of the subsidiary and so where in such case, the subsidiary company incurs obligation or commits torts, the parent company will be liable for the r e s u l t i n g consequences of such acts. Strangely enough, in view of the present state of authority and the great light thrown upon the question by the well considered opinions, courts still lapse into the former position that the corporate entity cannot be surmounted and when it is encountered in the course of an investigation, there the investigation must stop and the hand of justice must be staid. The Supreme Court of Kansas has gone on record that in the absence of fraud or other invidious and vitiating circumstances, the fact that one corporation was instrumental in the forming of another corporation and owned nearly all of the stock of the latter corporation, does not have the legal effect of making the parent corporation liable for the debts of subsidiary corporation, nor subjecting the property of the former to a lien in behalf of a creditor who claims all of the assets of the latter corporation under a trust deed. The faulty reasoning underlying the position of the *Kansas Court is readily* apparent. It

wholly overlooks the element of stock ownership, coupled with control. Under the doctrine announced by the Kansas court, the parent corporation may entirely own subsidiaries, do business through them, have complete control of their policies as its business, and at the same time if the allegation of fraud or other vitiating circumstances cannot be sustained, the parent corporation cannot be held liable for the direct consequences of its own managing and conducting of its subsidiary corporation. *It is encouraging, however, that such decisions in modern times are sporadic.*"

The Standard exercised its power of control as completely as if it had entered into a management contract with the Deep Rock. Mr. O'Brien, President of the Standard, the Management Corporation, H. M. Byllesby and Company, and the Deep Rock, drew no salary from the Deep Rock. He was paid by the Management Corporation, a mere agency of the Standard. He had the last word on everything. The Standard, through the members of its own Board of Directors acting as a majority of the Deep Rock's Board of Directors, actually managed the Deep Rock's properties.

The opinion of the Second Circuit Court of Appeals in *Costan* v. *Manila Electric Co.*, 24 F. (2d) 383, is in point. There the court said:

> "While stock ownership alone does not render a holding company responsible for the torts of the subsidiary company, still, if the holding company uses its stock ownership in such manner as actually to control and operate the properties of its subsidiary, it does become responsible."

See, also:

Gulf, C. & S. F. Ry. Co. v. *Cities Service Co.*, 281 Fed. 214;

In re Muncie Pulp Co., 139 Fed. 546;

Hunter v. *Baker Motor Vehicle Co.*, 225 Fed. 1006;

In re Watertown Paper Co., 169 Fed. 252;
Clere Clothing Co. v. *Union Trust & Savings Bank*, 224 Fed. 363.

See, also, authorities on page 207, etc., of this abstract and brief.

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